

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 10,989

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA *United States Court of Appeals*
For the

District of Columbia Circuit

FILED SEP 5 1951

JASPER PORTER, *Appellant*, *Joseph W. Stewart*

CLERK

v.

J. FAIRFAX CONRAD, *Appellee*

Appeal from the Municipal Court of Appeals
for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

I. The principal question involved herein, is whether, under the District of Columbia Owners' Financial Responsibility Act, (D. C. Code, 1940 Edition, Title 40-403), the owner of a motor vehicle should be held liable for injuries or damages which occur while his vehicle is being driven by a third person allowed by the owner's permittee or agent to drive or use the vehicle?

II. Corrollary to the foregoing question, the second question is whether, under the aforesaid Act, "agency", as such, is any longer to be the criterion for liability upon the owner of a motor vehicle?

III. Auxiliary to both the foregoing questions, is the question whether, under the Act of Congress creating the Municipal Court of Appeals for the District of Columbia (Public Law 512, 77th Congress, Chapter 207, Second Session, H.R. 5784, approved April 1, 1942), where the issues of fact shall have been tried by jury (in the Municipal Court for the District of Columbia), and affirmed by the trial court in denying motions for new trial and for judgment notwithstanding the verdict, the said Municipal Court of Appeals for the District of Columbia may review the case as to the facts as well as the law?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,989

JASPER PORTER, *Appellant*

v.

J. FAIRFAX CONRAD, *Appellee*

Appeal from the Municipal Court of Appeals
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Jasper Porter, successful plaintiff in the trial court, from a decision of the Municipal Court of Appeals for the District of Columbia reversing a judgment for property damages arising out of a motor vehicle collision, which judgment had been entered on a jury verdict in his favor in the trial court after the trial judge overruled and denied motions for new trial and for judgment notwithstanding the verdict.

The Municipal Court for the District of Columbia had exclusive jurisdiction of the original controversy, since the amount involved did not exceed \$500.00 (Title 11-755, D. C. Code, 1940 Edition). The Municipal Court of Appeals for the District of Columbia had jurisdiction to review the judgment as to matters of law only, by virtue of the Act of Congress creating said court (Title 11-772, D. C. Code, 1940 Edition).

This Court has jurisdiction to review the judgment of the Municipal Court of Appeals herein, by virtue of the Act of Congress of April 1, 1942, 56 Stat. 196, ch. 207, Sec. 8 (also found in Title 11-773, D. C. Code, 1940 Edition), and by order of this Court dated June 20, 1951, this Honorable Court allowed an appeal from the aforesaid judgment of the Municipal Court of Appeals for the District of Columbia.

The pleading showing evidence of the original jurisdiction is the Particulars of Demand filed in the Municipal Court (App. 2A).

STATEMENT OF THE CASE

Appellant was the plaintiff below, in an action for damages against the appellee arising out of a motor vehicle collision involving appellant's car, which was demolished while legally parked on a public street in front of his home. Appellant's car was struck by a truck owned by the appellee and driven at the time of the accident by a third person to whom the truck had been loaned by the appellee's employee. Damages amounting to \$479.00 were stipulated. The case being submitted to a jury, the defendant-appellee was held liable in said amount by the jury's verdict in favor of plaintiff. Thereafter, the defendant, through counsel, filed motions for new trial or in the alternative for judgment notwithstanding

ing the verdict (App. 2A, 3A), both of which motions were overruled and denied by Judge Quinn, the trial judge (App. 3A). The defendant thereupon appealed to the Municipal Court of Appeals for the District of Columbia (App. 3A) and on April 5, 1951, in an opinion written by Judge Claggett for said Court (App. 4A), said jury verdict and judgment thereon was "reversed, with instructions to enter judgment for defendant" (App. 10A).

The appellee (defendant) was the owner of six or seven trucks, and he was engaged in the hauling business. Among his contracts was one to haul ashes from Walter Reed Hospital every Sunday morning, during the winter months, to a place in Kensington, Maryland. The defendant's place of business, or lot, was not open on Sunday mornings (App. 19A). He therefore assigned this job to one George Washington, an employee (as truck driver) for many years, and gave Washington authority to take this truck of defendant's home with him on Saturday, so that he could haul the said ashes from Walter Reed Hospital on Sunday morning, and then return to his regular work on Monday morning, said Washington therefore having lawful possession of the truck over the entire week-end, with the defendant's express consent (App. 19A, 20A). Although he had been given instructions on previous occasions as to the use of the truck over such week-ends, both defendant's manager, Bazzle, and Washington himself, testified that on the week-end of this accident he had not been given any definite instructions as to the use of the truck (App. 20A, 27A, 30A).

On Saturday, December 10, 1949, after getting off work, said Washington, instead of going directly to his home with defendant's truck, immediately drove to a place where he knew a poker game was in progress, and engaged in playing poker all that night and until 6:00 A.M. the following Sunday morning, (App. 30A). Some time after

midnight that Saturday, Washington loaned the truck to one Baylor, a friend of his, for the purpose of going out to get some sandwiches and cigarettes, and while the truck was in Baylor's custody the accident occurred. Washington and Baylor contradicted each other in several respects as to matters on which neither could have been mistaken, and which conflicts seriously affected the credibility of both. Washington testified that Baylor was one of those present at the poker game (App. 27A, 28A, 30A, 31A). Baylor denied that, or that he was anywhere near the address where the poker game was in progress (App. 37A, 38A, 39A). Washington testified that he gave Baylor the keys to the truck while both were at the house where the aforesaid poker game was in progress, i.e.—21st and Ward Place, N.W. (App. 27A, 28A). Baylor testified that Washington had given him the keys to the truck while at Baylor's home, at 1269 25th St., N.W. (App. 36A, 37A, 38A, 40A). Washington testified that Baylor was to go to some restaurant near Wisconsin Ave. and M Sts. for the sandwiches and cigarettes. Baylor testified that he had gone to a restaurant in the southwest section of the city, near the wharf (App. 37A, 38A), and that he had consumed sandwiches in the said restaurant, and had none with him.

At any rate, both Washington and Baylor did agree that the former had loaned the latter the truck, and that Baylor had not "stolen" it. There was never any prosecution of Baylor for "unauthorized use" of the vehicle under Title 22-2204, D.C. Code, 1940 Edition.

On the foregoing evidence, the trial jury (as the sole judges of the facts), after being fully instructed on the law, found that Baylor was driving the defendant's truck, with the defendant's consent, express or implied; that Baylor was negligent at the time of the accident, and accordingly returned a verdict in plaintiff's favor.

STATEMENT OF POINTS ON APPEAL

1. The Municipal Court of Appeals erred in holding that under the District of Columbia Owners' Financial Responsibility Act, the owner of a motor vehicle is not liable for injuries or damages which occur while his vehicle is being driven by a third person allowed by the owner's permittee or agent to drive or use the vehicle.

2. The Municipal Court of Appeals erred in holding that Baylor was not the agent of the owner and that the owner was therefore not liable.

3. The Municipal Court of Appeals erred in substituting its own conclusions on the evidence for that of the jury, and thereby usurped the functions of the jury contrary to the Act of Congress which created said court.

SUMMARY OF ARGUMENT

I. The owner of a motor vehicle should be held liable for injuries or damages which occur while his vehicle is being driven by a third person allowed by the owner's permittee or agent to drive or use the vehicle, under the D.C. Owners' Financial Responsibility Act (Title 40-403, D.C. Code, 1940 Edition).

II. The lack of "agency" as understood at common law, is no longer a defense in motor vehicle cases in the District of Columbia, since a new rule of liability has been imposed upon owners of motor vehicles, under the Responsibility Act, based upon a "constructive agency" when the motor vehicle is being used with the consent, express or implied, of the owner.

III. The Municipal Court of Appeals, being a statutory court of intermediate appeal, is without authority to review cases as to matters of fact, when such facts have been determined by a jury in the trial court.

ARGUMENT

I.

The Owner of a Motor Vehicle Should Be Held Liable for Injuries or Damages Which Occur While His Vehicle is Being Driven by a Third Person Allowed by the Owner's Permittee or Agent to Drive or Use the Vehicle, Under the D. C. Owners' Financial Responsibility Act (Title 40-403, D. C. Code, 1940 Edition).

Title 40-403, District of Columbia Code, 1940 Edition, which contains the Financial Responsibility Act for the District of Columbia, provides as follows:

"Whenever any motor vehicle, after the passage of this chapter, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner."

Liabilities of the type involved in the instant case, under Financial Responsibility statutes similar to our own, are exhaustively annotated in—147 *A.L.R.* 875. The matter can be expressed in no clearer terms than does the editor of such annotation, in the following words:

"The purpose of the enactment of statutes making an owner of a motor vehicle liable for injuries or damage resulting from its negligent operation by another using it with the owner's permission, is the protection of the public. In harmony with that purpose, it would seem that an owner of a motor vehicle should be held liable for injuries or damages which occur while his car is being driven by a third person allowed by owner's permittee (or agent) to drive or use the car, since the power to prevent injury to the public by the negligent use of his car is vested in the owner."

In *Crockett v. United States* (1940), CCA 4th, 116 F. 2d 646, an action against an automobile dealer to recover for injuries resulting from the negligent operation of his automobile, it was held that the salesman was acting within the scope of his authority and that the dealer was charged with liability, where the dealer had turned the car over to the salesman to sell, and the salesman had invited a friend who was a prospective purchaser into the car, and also a friend of such person, and all of them indulged in drinking liquor and became intoxicated, and the salesman requested the others to drive and an accident occurred while one of the others was driving the car and the salesman was asleep or unconscious on the back seat of the car.

In *Aarons v. Standard Varnish Works* (1937), 163 Misc. 84, 296 N.Y.S. 312 (affirmed without opinion in (1938), 254 App. Div. 560, 3 N.Y.S. 2d 910), an action against a corporation to recover for an injury resulting from the negligent operation of its automobile, it was held that the fact that the car was being driven by one other than the person to whom the corporation had directly intrusted it, was not controlling, that a corporation can act only by its representatives, that if a salesman into whose custody the automobile in question had been placed had turned it over to another for legitimate purposes when an accident occurred, his act in doing so might be said to be that of the corporation itself, and that the evidence was sufficient to support a verdict against the corporation under a statute making the owner liable for an injury which results from its negligent operation by another with the owner's consent.

In *Hall v. McDonald*, (1938) 229 Wisc. 472, 282 N.W. 561, it was held that—

“If the authorized driver places at the wheel an incompetent substitute, the employer is not less liable than he would be if the driver left the car on an incline without sufficiently applying the brakes. . . .

Nor is the employer relieved of liability because the employee had no legitimate reason for making the substitution. The act of an employee may be within the scope of his employment although done in part to serve the purposes of the servant or of a third person."

In *Scheuing v. Challiss* (1937, Tex. Civ. App.), 102 S.W. 2d 477, the court stated:

"Where a servant permits a third person to drive a truck, liability of the master must be based on the servant's negligence in placing at the wheel a substitute without skill and experience and failing to properly supervise the operation thereof and intervene to avert loss when an intervention would avail."

In the following cases the owner was held liable for damages where his car was being driven by someone strange to him, whom the owner's agent or servant had authorized to drive:

Waggaman v. General Finance Co., (1940, CCA 3rd), 116 F. 2d 254

Medeiros v. Honolulu Motor Coach Co., (1939), 34 Hawaii 730

Coon v. Monroe Scrap Material Co., (1939, La. App.), 191 So. 607

In *Potter v. Golden Rule Grocery Co.*, (1935), 169 Tenn. 240, 84 S.W. 2d 364, where the owner had expressly instructed his servant not to permit a stranger to drive, the question of the owner's liability was held to be for the jury. To the same effect is—

St. Joseph, to use of Fidelity Casualty Co. v. Grantham Motor Sales, (1934), 269 Mich. 260, 257 N.W. 701

Koski v. Muccilli (1938), 201 Minn. 549, 277 N.W. 229

Bennett v. Nazzaro (1932), 144 Misc. 450, 258 N.Y.S. 828, affirmed in 237 App. Div. 866, 261 N.Y.S. 1018

Hazzard v. Frick (1935), Cal. App., 44 P. 2d 447

Hughes v. Quackenbush (1934), 1 Cal. App. 2d 349, 37 P. 2d 99

Nu Grape Bottling Co. v. Knott (1933), 47 Ga. App. 539, 171 S.E. 151

One of the most recent and exhaustive opinions dealing with the liability of the owner where his car is being driven by a stranger, contrary to the owner's express instructions, is *Souza v. Corti*, 22 Cal. 2d Adv. p. 464, 139 P. 2d 645, in which case a judgment for the owner was reversed on appeal. The owner had granted the use of his car to an adult son, with express directions not to permit anyone else to drive it. The son and a friend drove to a dance hall, where they picked up two strange girls and indulged in drinking alcoholic beverages. On leaving the dance hall, destined for another place, the son rode with one of the girls in her car, letting his friend drive the father's car, with the other girl. While thus driving, the friend was involved in an accident. The trial court had exonerated both the son and the father, but the appellate court reversed as to both.

In *Arcara v. Moresse*, 258 N.Y. 211, 215, 179 N.E. 389, an owner had permitted his nephew to use his car, with express instructions not to let anyone else drive same. The nephew let a friend drive, contrary to such instructions, although the nephew was still in the car. An accident occurring while such nephew's friend was driving, the owner was held responsible. The court there stated—

“To bind the owner, there must be ‘negligence in the operation’ of the motor vehicle; but the negligent act may be performed ‘by any person legally using’ the motor vehicle, or by any person ‘operating the same’. Thus, the legal user may be guilty of negligence in ‘operation’, though not ‘operating’ the car, in the sense that he is driving with his own hands. The clear implication is that, if the legal user at the time be present in the car, still the ‘direction of the enterprise’, still ‘the master of the ship’, the operation of the car is his operation, though the hands at the wheel are those of a substitute, and the negligent driving will bind the owner, with whose permission the car is used.”

To the same effect is—

Elfield v. Burkham Auto Renting Co., 299 N.Y. 336 (1949)

Feitelberg v. Matuson, 124 Misc. 595, 208 N.Y.S. 786

Sutton v. Tanger, 115 Cal. App. 267, 1 P. 2d 521

In *Schweinhaut v. Flaherty*, 60 App. D. C. 151, 49 F. 2d 533, decided April 6, 1931 (four years before the passage of the Owners' Financial Responsibility Act in this jurisdiction), this very Court considered an analagous situation, in holding an owner responsible even though an employee had violated the owner's instructions. In the *Flaherty* case, a taxicab driver, in violation of his employers rules, drove his girl friend to her home, without charge, after having taken her to dinner, going out of his regular and authorized way to his several taxi stands. In affirming a jury verdict for the plaintiff, this court held that the employer was properly held liable, since he is required to exercise such supervision of his drivers as will avoid disobedience and disregard of rules, in view of the dangerous instrumentality placed in the driver's possession and control, and, failing to do so, is liable for injury occurring through the negligence of the driver notwithstanding the injury is caused by the disobedience of the employer's rules. This Honorable Court in the *Flaherty* case quoted with approval from the opinion of Mr. Justice Sutherland in the case of *District of Columbia v. Colt*, 282 U.S. 63, 51 S. Ct. 52, 53, 75 L. Ed. 177, to the effect—

“We cannot shut our eyes to the fact that an automobile in the crowded conditions of street traffic as it exists today in large cities, is ‘potentially, a dangerous instrumentality’, nor to the further fact, of universal knowledge, that the fatalities due to its use, as shown in the published statements of state bureaus and insurance companies, approach those of modern warfare. Nor likewise are we unmindful of the fact that conditions in this respect are growing worse rather than better.

"In these circumstances, it seems to us the duty of the courts to indulge no subtle reasoning in extending the doctrine of non-liability to the owner of such an instrumentality who, in his search of gain and profit, places one of these in irresponsible hands, *but rather to require of him such supervision of his servant as will avoid disobedience to and disregard of his rules, or, failing so to do, when injury occurs to a stranger, to shoulder the responsibility.*" (underscoring ours)

In the Flaherty case, *supra*, this Court also cited with approval, the case of *Philadelphia & Reading R. Co. v. Derby*, 14 How. 468, 487, 14 L. Ed. 502, in which Mr. Justice Grier stated:

"Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive, to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the 'causa causans' of the mischief; while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so entrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law, affecting such cases, would be highly detrimental to public safety."

Although this point seems to be one of first impression in this jurisdiction under our Financial Responsibility Act, *supra*, this Honorable Court impliedly recognized such a liability upon an owner of a motor vehicle for damages sustained while his vehicle was being operated by a third person with the owner's permittee's consent, in denying a Petition for Writ of Error to the Municipal

Court on October 13, 1938 (three years after the passage of the Financial Responsibility Act), in the case of—*Mandell Chevrolet Corporation v. Thomas*, Original No. 2971, United States Court of Appeals for the District of Columbia. In the *Mandell* case, a similar factual situation existed. The corporation, through one of its salesmen, one Spindle, loaned one of its cars which had been for sale, to one Griffin, a prospective purchaser of such car, to go to Griffin's home for the avowed purpose of getting the down payment on same. Spindle, the corporation's agent, had given Griffin specific instructions to use the car only for the purpose stated, and not to allow anyone else to drive it. Griffin took the car, stopped by a parking lot where he picked up a friend, one Littlejohn, and went directly to a place some distance from his home, where he made a bet on the "numbers game" (possibly intending to secure his down payment through a lucky hit), and when returning from said place, he let Littlejohn drive the defendant's car. While Littlejohn, a stranger to Mandell Chevrolet Corporation, was thus driving, an accident occurred at 8th and L Streets, involving another motor vehicle. The owner of this damaged car then sued the Mandell Chevrolet Corporation in the Municipal Court, and the case was tried to a jury, resulting in a verdict for the plaintiff. A singular coincidence in the Mandell case is the fact that the trial judge was Judge Nathan Cayton, who later became and now is the Chief Judge of the present Municipal Court of Appeals (which court was not in existence in 1938). Chief Judge Cayton participated in the decision of the instant case now under appeal. In charging the jury in the *Mandell* case, Judge Cayton stated to them:

"You have heard the testimony which has been brought here in behalf of the defendant company. You must examine that testimony, and say whether in your opinion the circumstances of the intrusting of the automobile to the driver, Griffin, was such as

to relieve the Mandell Chevrolet Company of liability, because the law raises the presumption that the automobile was intrusted, expressly intrusted to Griffin. Now, then, they come in with testimony to overcome that presumption. That testimony is not contradicted in this case, and because it is uncontradicted, by reason of the circumstances, I am submitting it to you to say whether they have overcome the presumption or not, the presumption being, as I have said, that the automobile was entrusted to Griffin by them."

Judge Cayton, in the *Mandell* case, like Judge Quinn, in the instant case, had refused to direct a verdict for the defendant at the conclusion of the evidence, although there was no testimony of the plaintiff in the *Mandell* case to contradict the defendant's witnesses. After verdict for plaintiff, he likewise refused to grant a new trial on motion of the defendant. And on petition for writ of error to this court, this Honorable Court refused to review the matter, thereby, at least impliedly, recognizing a liability upon an owner under such circumstances.

Now the issue is raised squarely for a further interpretation of our Financial Responsibility Act as bearing upon this factual situation. The issue is important to the general motoring public, so that they may know in advance whether they have a remedy or not, under such circumstances. It is likewise important to the many liability insurance carriers who do business in this District, so that they may regulate and govern their liabilities in accord with a definite standard of liability.

II.

The Lack of "Agency", as Understood at Common Law, is no Longer a Defense in Motor Vehicle Cases in the District of Columbia, Since a New Rule of Liability Has Been Imposed Upon Owners of Motor Vehicles, Under the Responsibility Act, Based Upon a "Constructive Agency" When the Motor Vehicle is Being Used With the Consent, Express or Implied, of the Owner.

Judge Clagett, speaking for the Municipal Court of Appeals in the instant case, states (App. 9A, 10A):

"In the face of the uncontradicted testimony of defendant and his manager and of the driver of the truck in its essential points that Washington had been ordered not to use the truck on his personal business and had also been ordered not to allow any third person to drive it, we cannot escape the conclusion that the man who was driving this truck at the time of the accident was not doing so with the express or implied consent of the owner. So driving, he was not the agent of the owner and the owner was not responsible."
(underscoring ours)

Although the question of "consent" is a question of fact, Judge Clagett substitutes his "conclusion" for that of the jury's, which had heard the witnesses and had the opportunity to observe their demeanor and manner of testifying, which opportunity Judge Clagett did not have. However, the last sentence of the above quotation seems to imply that since Baylor was on a personal errand of his own, and not on any business of the defendant's, "he was not the agent of the owner and the owner was not responsible."

Prior to the Financial Responsibility Act, there must have been proof of an actual agency, under the doctrine of respondeat superior, to render a motor vehicle owner liable in damages.

However, in the very first case decided by this Honorable Court after the passage of this statute, i.e., *Forrester v. Jerman*, 67 App. D. C. 167, 90 F. 2d 412, decided April 12, 1937, this court held:

“We think the conclusion inescapable that Congress, in the passage of the Act, intended not only to prescribe penalties for the unlawful and negligent operation of an automobile, whether by the owner or another, and to provide financial safeguards against recurrences, *but to establish as well a new rule of liability in which agency is based on consent. . . .* The section in the Act creating the new liability goes a step further and makes the person to whom the owner has lent the automobile the agent of the owner, and the result of this is to make the owner liable, *upon analogy* to the principles of agency, for any injury negligently inflicted by a person using the automobile with his consent.” (underscoring ours).

In the *Forrester* case, *supra*, there was no relationship of principal and agent, or master and servant, as such. The owner of the vehicle involved had simply loaned it to the driver for a personal use of such driver. Under such circumstances, since consent was present, the owner was held liable.

On June 11, 1934 (just one year prior to the passage of Financial Responsibility Act), this Court still held to the theory of liability based only upon actual agency, as reflected in the case of *Peabody v. Marlboro Implement Company*, 63 App. D. C. 288, 72 F. 2d 81. In the *Peabody* case, although there was an actual relationship of employer and employee between the owner of the vehicle involved and the driver, and the driver had exclusive possession of the company's vehicle for his use as a bill collector, he was on a personal mission of his own at the time of the accident, and not on company business. Here, although the driver had possession of the car with the express knowledge of the owner-employer, the court held

no liability to exist because of a lack of agency at the very time of the accident.

The *Forrester* case, *supra*, after the passage of the Act, was a complete reversal of the *Peabody* case, rendering the doctrine of the *Peabody* case no longer the law in this jurisdiction.

In the intervening 14 years since the decision in the *Forrester* case, *supra*, many cases have been heard and decided by this Court, under varying factual situations, but the tendency has been to further extend the "new rule of liability" by imposing still stronger curbs and responsibilities upon the owners of motor vehicles for their negligent acts in not safeguarding the use or operation of same by others.

In *Mason v. Automobile Finance Co.*, 73 App. D. C. 284, 287, 121 F. 2d 32 (1941), this Court held:

"In the absence of some definite statutory criterion of ownership, *we think the purpose of the statute* was to place the liability upon the person in a position immediately to allow or prevent the use of the vehicle and to do so by giving a lawful and effective consent or prohibition to its operation by others. The object was to control the giving of consent to irresponsible drivers by the one having that power rather than to impose liability upon one having a naked legal title with no immediate right of control."

In the instant case, the defendant had the "immediate right of control." He might have assumed that Washington, being only human, would use the truck for his own personal purposes should the desire or occasion arise. If the defendant really intended to impose "a lawful and effective consent or prohibition to its operation by others", he could have required Washington to come to the defendant's lot on Sunday morning to get the truck (as he did on regular week-days), do his regular assignment at Walter Reed Hospital, and then return the truck to the

lot. But by giving him carte blanche possession of the truck for the entire week-end, he impliedly consented to its use while thus out. Baylor did not steal the truck. Washington, defendant's trusted employee, gave him the keys to same, and expressly consented to his use of it on the night in question.

In three fairly recent cases, this Court has held the owners of motor vehicles responsible in damages, even where an intermeddler, without the express or implied knowledge or consent of the respective owners, drove the vehicle at the time of the accident.

Ross v. Hartman, 78 U. S. App. D. C., 217, 139 F. 2d 14
Schaff v. Claxton, 79 U. S. App. D. C. 207, 144 F. 2d 532, and
Claxton v. Schaff, 83 U. S. App. D. C. 271, 169 F. 2d 303.

As a matter of fact, Washington continued to play poker for several hours after Baylor should have returned from the sandwich and cigarette trip. He made no effort to ascertain where Baylor was, or what might have caused his delay in returning, until six o'clock Sunday morning, when it was almost time for Washington to report for duty at Walter Reed Hospital. His reason for not having gone for the sandwiches and cigarettes himself was that he "had money involved on the table, and I just didn't care to leave." (App. 31A).

III.

The Municipal Court of Appeals, Being a Statutory Court of Intermediate Appeal, is Without Authority to Review Cases as to Matters of Fact, When Such Facts Have Been Determined by a Jury in the Trial Court.

Public Law 512, 77th Congress, Chapter 207, Second Session, H. R. 5784, approved April 1, 1942 (Title 11-771, D. C. Code, 1940 Ed.) is the Act which gave birth to the

Municipal Court of Appeals for the District of Columbia. Prior to 1942 there existed no appeal as a matter of right from any decision of the Municipal Court, the only appellate review from the Municipal Court being by way of Petition for Writ of Error directly to this Court. Since the passage of this statute, there now exists an appeal of right from any judgment above \$50.00 in said court.

However, Title 11-772 (c) provides as follows:

* * * *

“If the issues of fact shall have been tried by jury, The Municipal Court of Appeals for the District of Columbia shall review the case only as to matters of law. If the case shall have been tried without a jury, The Municipal Court of Appeals for the District of Columbia shall have the power to review both as to facts and the law, but in such case the judgment of the trial court shall not be set aside except for errors of law or unless it appears that the judgment is plainly wrong or without evidence to support it.”

It will be noted that by virtue of the above, the jury's conclusions of the facts in evidence is final. There is no exception thereto as in the case of a non-jury trial, where the court is the judge of the facts, as well as the law.

Judge Clagett, in writing the opinion of the Municipal Court of Appeals in the instant case, comments on the evidence herein, and attempts to re-weigh same, in at least three instances. In the third paragraph of his opinion (App. 5A), he commences:

“The location of various addresses have some bearing on the question of responsibility for the accident.”

This was a typical jury function, to determine just what bearing the “various addresses” had on the question of responsibility, and the jury did determine same.

In the very next paragraph of Judge Clagett's opinion for the Municipal Court of Appeals (App. 6A) he commences:

"The stories of Washington and Baylor differed in one or more *important* respects." (emphasis ours)

Judge Clagett then points out the differences as they appear to him, and concludes the same paragraph with:

"The only importance of these differing stories is the *reliance* to be placed on Washington's *credibility*." (emphasis ours)

The reliance to be placed on the testimony of any witness, his credibility, veracity, interest or bias, are exclusively questions of fact to be determined by the triers of the facts, in this case, the jury. Washington was an important defense witness. If his credibility was attacked, or in doubt, it was entirely up to this jury to accord as much or as little weight to same as it felt such testimony deserved.

And finally, toward the end of Judge Clagett's opinion (App. 9A) he states:

"* * * Possibly a shade of doubt could be cast upon Bazzle's testimony as to the instructions given Washington by Bazzle's use of the phrase "of course" in reciting such instructions, but *this does not necessarily* follow and, read as a whole, the testimony of defendant's witnesses on the vital points was uncontradicted and in no sense inherently improbable."

Bazzle was the defendant's manager, and as such was an important witness. Manifestly he was an interested witness, being still in the employ of the defendant. However, if his manner of testifying, his use of certain words in so testifying, his evasiveness, or eagerness, in any manner "cast a shadow of doubt" upon his testimony, that too was a typical jury function, to determine the degree of doubt, and whether he was to be believed at all.

It has been held that even uncontradicted testimony by interested witnesses, such as defendant, is not conclusive, and may be disregarded by the jury; so that in the ab-

sence of evidence by disinterested witnesses the issue of credibility must be submitted to the jury.

Glasgow v. Weldt, 218 App. Div. 749, 218 N.Y.S. 115
Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.
 2d 39
McMullen v. Warren Motor Co., 174 Wash. 454, 25 P.
 2d 99

Indeed, this Honorable Court, as late as April 26, 1951, in *Wynne et al v. Boone*, No. 10429 and 10430, 87 U. S. App. D. C., similarly held. In this case, this Court, speaking through Judge Washington, held; in sustaining the judgment of the District Court in a non-jury matter:

“In this case, in contrast with such cases as *Dollar v. Land*, 184 F. 2d 245, the evidence was not primarily documentary. Oral testimony, dependent upon the “candor and credibility of the witnesses,” (*United States v. Gypsum Co.*, 333 U. S. 364, 395, was the crux of the case. The trial judge saw and heard the witnesses; we have done neither. Under Rule 52, we must give due weight to the opportunity which he thus possessed. We must recognize that the trial judge may disregard the testimony of a particular witness “even in the absence of any direct conflicting testimony. He (the witness) may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.” *Quock Ting v. United States*, 140 U. S. 417, 420-21”

In the *Wynne* case, *supra*, even Judge Clark, who dissented on other grounds, recognized the fundamental principles stated above, when he stated:

"I agree with that large part of the court's opinion which is devoted to the great weight to be accorded to the findings of the trial judge, who tried the case without a jury. No citation of authorities is necessary to prove this point which is universally recognized. * * *"

This Honorable Court, some seven years ago, had occasion to consider the very point raised in appellant's Argument III, in *Nolan v. Werth*, 79 U. S. App. D. C. 33, 142 F. 2d 9 (Apr. 10, 1944). In the *Nolan* case, this court, speaking through Mr. Chief Justice Groner, and reversing the Municipal Court of Appeals, stated:

"We took this case only for the purpose of setting at rest the question of appellate jurisdiction in the circumstances we have shown. The Act of Congress establishing the Municipal Court of Appeals provides that "If the case shall have been tried without a jury, * * * the judgment of the trial court shall not be set aside except for errors of law or unless it appears that the judgment is plainly wrong or without evidence to support it."

Mr. Chief Justice Groner, after mentioning the evidence in the *Nolan* case, *supra*, then held:

"In short, the evidence was such that either one of two different conclusions might reasonably have been drawn from it, and in such a case we have said time and again the decision is for the trial court; that its judgment must stand and that the appellate court may not re-weigh the evidence or overrule the findings, except where it clearly appears they are manifestly wrong. In the case we have here it is enough to say, as the Supreme Court said in *Lawson v. United States Mining Co.*, 207 U. S. 1-12, 28 S. Ct. 15, 52 L. Ed. 65, that if the testimony is not sufficient to show that the trial court's decision is necessarily right, it wholly fails to show that it is necessarily wrong, from which it follows that the appellate court was incorrect in substituting its own findings. (citing other cases)."

It must be remembered that in the instant case (*Porter v. Conrad*), that the trial judge, Judge Quinn, who heard the same evidence as did the jury in this case, and who had the same opportunity to observe the demeanor and attitude of all the witnesses and thereby judge of their credibility, overruled and denied two motions for directed verdict herein—one at the conclusion of the plaintiff's evidence, and a second such motion at the end of all the evidence. And after rendition of the jury's verdict in favor of plaintiff, the same trial judge overruled and denied the defendant's motions for judgment notwithstanding the verdict, or in the alternative for new trial. The question of "consent" to the use of a motor vehicle by another has repeatedly been held to be a question of fact for the triers of the facts. In this case, under full and appropriate instructions by the trial judge (App. 41A), the triers of facts (the jury) answered such factual question in favor of the plaintiff.

After the decision of this court in the *Nolan* case, *supra*, same apparently had a salutary effect upon the Municipal Court of Appeals, because in at least five (5) non-jury actions, and in two (2) jury actions (possibly more), the Municipal Court of Appeals adhered to the *Nolan* decision.

In *Ferranti v. Capital Transit Co.*, 38 A. 2d 116 (1944), an accident case, the Municipal Court of Appeals, speaking through Judge Hood, after stating the trial court's findings in a non-jury trial, held:

"The findings of the trial judge were supported by substantial evidence *and cannot be disturbed by us.*"
(emphasis ours)

In *Rossiter v. National Savings & Trust Co.*, 46 A. 2d 540 (1946), the Municipal Court of Appeals, in reviewing a debt action tried by the court without a jury, this time speaking through Chief Judge Cayton, stated:

“* * * There were in the plaintiff's evidence several discrepancies which we need not detail here. There were some contradictions too. *But it is not our function to weigh evidence, or to decide issues of fact, or pass upon the credibility of witnesses. We cannot say that the evidence as a whole was such as to justify us in holding that the trial judge was “plainly wrong” in deciding for plaintiff on his claim.*” Citing *Nolan v. Werth*, supra (underscoring ours)

In *Goldberg v. Roumel*, 47 A. 2d 790 (1946), the Municipal Court of Appeals, this time speaking through Judge Claggett (who wrote the opinion in the instant case), in affirming a judgment for a landlord in a non-jury action brought by a tenant, held that the Municipal Court of Appeals was not at liberty to set aside the trial judge's findings of fact unless they were clearly erroneous.

In *Hollingsworth v. Rieffer*, 57 A. 2d 199 (1948), which was a non-jury trial involving a broker seeking a realty commission, The Municipal Court of Appeals, in affirming a judgment for plaintiff, and again speaking through Judge Claggett (citing *Nolan v. Werth*, supra), held that a general finding of the trial court on factual issues cannot be overridden on appeal if there is sufficient evidence in the record, together with inferences to be fairly drawn therefrom, to sustain the finding.

In *Eesley v. Dottellis*, 61 A. 2d 564 (1948), the Municipal Court of Appeals, speaking through Judge Hood, held that where a Municipal Court judge found that a garage keeper or operator was negligent in failing to lock a customer's car which was placed overnight in his lot without a watchman, but that such negligence was not the proximate cause of injury to another parked automobile which was run into by one who had stolen such unlocked automobile, such findings of fact could not be disturbed on appeal.

In *Lyons v. Capital Transit Co., et al*, 62 A. 2d 312 (1948), in affirming a *jury verdict* for the defendant in a suit for back wages and to compel restoration to employment, the Municipal Court of Appeals, in an opinion written by Judge Claggett, stated, on page 313 thereof:

“Accepting the jury’s determination of the facts, as we are bound to do, it results * * *”.

In *Hooper v. Smith*, 72 A. 2d 466 (1950), in affirming a *jury verdict* for the defendant in an automobile conversion case, in one of the shortest opinions ever written by the Municipal Court of Appeals, said court, speaking through Judge Hood, held that it cannot weigh the evidence, and therefore could not consider assignments of error that the verdict was contrary to the evidence and that the verdict was contrary to the weight of the evidence.

However, in *Rogers v. Cox*, 75 A. 2d 776, 778 (decided Sept. 27, 1950, less than a year ago), in a split decision in which the majority opinion was written by Judge Claggett, and concurred in by the Chief Judge, the Municipal Court of Appeals reversed a judgment of the trial court in an automobile accident case tried without a jury. Judge Claggett in the *Rogers* case, *supra*, after commenting extensively on the evidence in the case and the inferences to be drawn therefrom, and with full knowledge of the provisions of the special statute creating the Municipal Court of Appeals, and of this court’s decision in *Nolan v. Werth* (since he quoted and cited both), then substituted his own conclusions on the evidence, which was at variance with those of the trial court. Judge Hood, in his dissent, and in harmony with his opinions in the *Ferranti*, *Eesley* and *Hooper* cases, *supra*, stated:

“By its finding of fact that plaintiff was not guilty of contributory negligence the trial court found that the negligence, if any, of plaintiff did not contribute to the accident. *Whether or not it did was a question of fact and I do not think we can substitute our judgment on a question of fact for that of the trial judge.*
* * *

Thus it is apparent that although the Municipal Court of Appeals followed the mandate of *Nolan v. Werth*, supra, for almost seven years, in refusing to reweigh factual issues once decided by the trial court, there now seems to be a division of opinion in said court, and thus this may be the proper opportunity to remind the Municipal Court of Appeals that the doctrine of *Nolan v. Werth*, supra, as expressed by this Honorable Court in 1944, is still the law of this jurisdiction.

CONCLUSION

In conclusion, and in view of the foregoing authorities and argument, it is respectfully submitted that the Municipal Court of Appeals erred in reversing the judgment of the trial court based upon a jury verdict herein; and that accordingly, the judgment appealed from should be reversed, and the original judgment of the trial court based upon the jury's verdict should be reinstated.

Respectfully submitted,

EARL H. DAVIS,
Attorney for Appellant,
900 F Street, N. W.,
Washington 4, D. C.

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,989

JASPER PORTER, *Petitioner,*

v.

J. FAIRFAX CONRAD, *Respondent.*

Appeal from the Municipal Court of Appeals
for the District of Columbia

JOINT APPENDIX

99 Filed January 17, 1950 Mun. Ct. D. C.

Particulars of Demand

The plaintiff sues the defendant for damages sustained to plaintiff's 1939 four-door Pontiac sedan as the result of a collision involving said plaintiff's vehicle while legally parked, and a motor truck owned and operated by the defendant, said collision occurring in the 1100 block of 25th Street, N. W., within the District of Columbia, on or about December 11, 1949, said collision having been caused by the negligence of the defendant, and damaging plaintiff's vehicle beyond repair, whereupon plaintiff demands judgment for the market value of said vehicle, which is\$500.00

Costs of this action

* * * *

101 *Verdict of the Jury*

November 7, 1950—Jury Sworn. Verdict for Pltf. for \$479.00.

—Judge Quinn.

102 Filed November 8, 1950 Mun. Ct. D. C.

Motion to Set Aside Verdict and for Judgment for the Defendant N. O. V. or in the Alternative for a New Trial

Comes now the defendant, by and through his attorneys, Welch, Daily & Welch, and moves the Court for an order setting aside the verdict herein rendered for plaintiff on November 7, 1950 and for judgment in accordance with defendant's motion for a directed verdict, or, in the alternative, for a new trial, or for a new trial generally on the following grounds:

(1). There was no substantial and competent evidence to sustain the verdict in favor of the plaintiff.

(2). The Court erred in submitting the case to the jury upon all the testimony in the case.

(3). The defendant upon all the evidence and upon the law applicable thereto under the appropriate decisions of the United States Court of Appeals for the District of Columbia and the Municipal Court of Appeals for the District of Columbia, was entitled to a directed verdict at the conclusion of all the testimony.

* * * *

104 *Court's Ruling on Motion to Set Aside Verdict and for Judgment for the Defendant N. O. V. or in the Alternative for a New Trial and Judgment*

November 15, 1950—Motion to Set Aside Verdict Overruled. Motion for new trial Denied 500 Bond Set.

—Judge Quinn.

November 20, 1950—Judgment on Verdict for Pltf. for \$479.00 int at 6% per annum from date & Costs.

—Judge Quinn.

105 Filed Nov 24 2:28 PM '50

* * * *

Walter E. Bramhall, Clerk of Municipal Court
Washington, D. C.

Notice of Appeal

Notice is hereby given that J. Fairfax Conrad appeals to The Municipal Court of Appeals for the District of Columbia from the judgment (order) of this court entered on the 15th day of November 1950.

Names and addresses of parties or attorneys
to be served:

Earl H. Davis, Esq.
900 F St., N. W.
Washington, D. C.
WELCH, DAILY & WELCH

* * * *

114 THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 1022

J. FAIRFAX CONRAD, *Appellant*

v.

JASPER PORTER, *Appellee*

Appeal from The Municipal Court for the
District of Columbia,
Civil Division

(Argued March 5, 1951 Decided April 5, 1951)

J. Joseph Barse, with whom *John R. Daily*, *H. Mason Welch*, and *J. Harry Welch* were on the brief, for appellant.

Earl H. Davis for appellee.

Before CAYTON, Chief Judge, and HOOD and CLAGETT, Associate Judges.

CLAGETT, *Associate Judge*: Plaintiff was the owner of an automobile which was demolished while legally parked on a street in front of his home. His car was hit by a truck owned by defendant and driven by a third person to whom the truck had been loaned by defendant's employee. Damages were stipulated. The case being sub-

mitted to a jury defendant was held liable. He appeals on the ground that his motion for a directed verdict at the conclusion of the evidence or for judgment notwithstanding the verdict should have been granted as a matter of law.

No serious question is raised as to the negligence of the person who was driving the truck and the trial turned completely on the responsibility of the defendant truck owner. He owns six or seven other trucks which were engaged in the business of hauling ashes and miscellaneous material. One of his contracts is to haul ashes from Walter Reed Hospital located on Georgia Avenue, N. W. Since a part of this arrangement is that the ashes be removed from the hospital early Sunday morning and since his truck yard is closed on Sunday, he and his general manager had established the custom of allowing his driver to take a truck home Saturday evening with instructions to get the ashes from Walter Reed Hospital, convey them to Kensington, Maryland, and then keep the truck at the driver's home Sunday night and return it to the office Monday morning. The accident occurred early Sunday morning when the truck was being driven by a man named Baylor, a friend to whom the regular truck driver, George Washington, allegedly loaned the truck.

The location of various addresses have some bearing on the question of responsibility for the accident. All of these addresses lie within a circle with a radius of about five blocks and a center at Twenty-fifth and M Streets, N. W. The truck yard of defendant Conrad from which Washington left with the truck late Saturday afternoon is at 604 Twenty-fifth Street. Plaintiff Porter lives at 1152 Twenty-fifth Street and his car which was struck was parked on the east side of Twenty-fifth Street just south of M Street. Baylor, driver of the truck at the time of the accident, lives at 1269 Twenty-fifth Street.

Washington lives at 1021 Cecil Place, also south of M Street and about five blocks west of Twenty-fifth Street. The other address claimed to be involved is at Twenty-first Street and Ward Place near the corner of Twenty-first and O Streets.

The stories of Washington and Baylor differed in one or more important respects. According to Washington, when he left the Conrad truck yard at 604 Twenty-fifth Street, he went directly to the Twenty-first Street and Ward Place address where he remained in a poker game until six o'clock the next morning. Baylor was one of those present, according to Washington, and some time after midnight he loaned Baylor the truck to get some cigarettes and sandwiches at Wisconsin Avenue and M Street. He didn't see Baylor again until after the accident. According to Baylor, however, Washington went to Baylor's home at 1269 Twenty-fifth Street; Baylor said he never went to Twenty-first Street and Ward Place; he never engaged in a poker game and the truck was loaned to him at his home on Twenty-fifth Street. Instead of going to Wisconsin Avenue and M Street for the cigarettes and sandwiches, he went to the Southwest section of the city and was returning home when the accident occurred. The only importance of these differing stories is the reliance to be placed on Washington's credibility.

The case as tried depended entirely upon the evidence as related to the District of Columbia Owners' Financial Responsibility Act, Code 1940, § 40-403 which in its pertinent part provides: "Whenever any motor vehicle, after the passage of this chapter, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be prima facie evidence that such

person operated said motor vehicle with the consent of the owner.”

In *Rosenberg v. Murray*, 73 App. D. C. 67, 116 F. 2d 552, it was said that: “The effect of this provision is simply to shift the burden of proof and to impose on the defendant owner the affirmative duty of proving that the car was not at the time of the accident operated with his express or implied consent. *Casey v. United States*, 276 U. S. 413. This presumption continues until there is credible evidence to the contrary, and ceases when there is uncontradicted proof that the automobile was not at the time being used with the owner’s permission.” It was added that in that case the owner had testified positively and unequivocally that the driver had taken the car without the owner’s knowledge, authority, or consent, “and his uncontradicted statement to this effect, of course, overcame the statutory presumption, just as similar testimony overcomes, as we have often held, the common-law presumption that an agent is on his master’s business when he drives his master’s car [citing cases]. In each of these cases the positive testimony which overcame the presumption was that of the owner.”

The same interpretation of the Act was included in *Hiscox v. Jackson*, 75 U. S. App. D. C. 293, 127 F. 2d 160, which threw further light on its proper construction by holding that doubt might be thrown on the owner’s testimony and the case thus become one for the consideration of the jury if proof offered by the owner contains inconsistencies and self-contradiction leaving some doubt as to the absolute credibility of the witnesses—two typical jury functions.¹

It is against the background of these decisions that we must consider the evidence in the present case. Conrad, the owner of the truck, testified that all of his drivers

¹ See also *Rice v. Simmons*, D. C. Mun. App., 53 A. 2d 587, 75 W. L. R. 979.

including Washington had been instructed not to use the trucks for private use and not to use them for anything "but what we tell them to do" and also that the drivers had been instructed never to allow anyone else to drive the trucks. He said that George Washington had been employed by him as a truck driver for twenty-five years and that he had never been given permission to use a truck for his personal use. On this particular weekend, he said he did not know Washington had the truck. He added, however, that he left the conduct of his business to Bazzle, his general manager.

Bazzle in turn told of the practice of allowing Washington to take the truck home over the weekend when ashes were to be collected at Walter Reed Hospital on Sunday. He said that on this particular weekend Washington was not given special instructions as to the use of the truck but that on previous similar occasions during the winter in question he had instructed Washington "to take the truck home and, of course, not to use it for anything else except the job that was given him to do," and that also during that winter Washington had received instructions "to let no one else drive it, of course, except himself." He also testified that he had never heard of anyone else, except Washington, driving the truck. He testified further that Washington was still in the employ of Conrad.

Washington testified that when he was hired he had received instructions to use the truck just for the work he was supposed to do and that "one of the main things they tell us is not to let anyone else drive the trucks. No one is supposed to drive a truck but the one that is using it." He said he had never previously departed from his instructions but that on the night in question he had allowed Baylor to take the truck keys and drive it.

The testimony of the owner of the truck and of his manager, both as to the use to be made of the truck and

as to its being driven by any third party was not contradicted in any way. Nor was the testimony of Washington on these points contradicted, although, as shown, he was contradicted as to his actual movements on the night in question. There was some slight leading of defendant's witnesses by defendant's counsel but this was stopped by the court when objection was made. Possibly a shade of doubt could be cast upon Bazzle's testimony as to the instructions given Washington by Bazzle's use of the phrase "of course" in reciting such instructions, but this does not necessary follow and, read as a whole, the testimony of defendant's witnesses on the vital points was uncontradicted and in no sense inherently improbable. In *Rosenberg v. Murray*, *supra*, the late Mr. Justice Rutledge then a member of the United States Court of Appeals, wrote a dissenting opinion and stated among other things that in the absence of evidence of disinterested witnesses, the issue of credibility must be submitted to the jury. This point was mentioned without approval in the subsequent case of *Hiscox v. Jackson*, *supra*, but the court went on to say that in the latter case the owner's testimony was not uncontradicted. Mr. Justice Stephens concurred in the result of the *Hiscox* decision and indicated his disagreement with the rule laid down in *Rosenberg v. Murray* because "it ignores the proposition that the credibility and dependability of testimony—even uncontradicted (as distinguished from undisputed) testimony—is for the jury." But he added that the *Rosenberg* rule is now the law in this jurisdiction. We feel compelled to follow that rule and, following it, to conclude in the present case that the trial court erred in submitting the case to the jury and in refusing to award a judgment for defendant notwithstanding the verdict.

In the face of the uncontradicted testimony of defendant and his manager and of the driver of the truck in its essential points that Washington had been ordered not

to use the truck on his personal business and had also been ordered not to allow any third person to drive it, we cannot escape the conclusion that the man who was driving this truck at the time of the accident was not doing so with the express or implied consent of the owner. So driving, he was not the agent of the owner and the owner was not responsible.

We think we should add plaintiff seeks to support the verdict of the jury in plaintiff's behalf and the submission of the case to the jury on the theory that defendant was negligent in turning the truck over to Washington for the weekend, Washington in turn was negligent in turning the truck over to Baylor and that such negligence was a proximate cause of the accident. We believe,, however, that neither the pleadings nor the proof justifies such a conclusion.

Reversed with instructions to enter judgment for defendant.

115

Thursday, April 5, 1951

The Court met pursuant to adjournment. Present: The Honorable Nathan Cayton, Chief Judge, Andrew M. Hood and Brice Clagett, Associate Judges.

* * * *

J. FAIRFAX CONRAD, Appellant,

v.

JASPER PORTER, Appellee.

No. 1022

October Term, 1950.

Appeal from the Municipal Court for the District of Columbia, Civil Division. This cause came on to be heard on the transcript of the record from the Municipal

Court for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be, and it is hereby, remanded to the said Municipal Court with instructions to enter judgment for defendant.

Brice Clagett,
Associate Judge.

April 5, 1951.

* * * *

3

Jasper Porter

* * * *

Direct Examination

* * * *

4 Q At that time did you own a motor vehicle?

A Yes, sir.

Q What kind of car was that? A A 1939 Pontiac.

Q And how long had you owned that car? A I owned that car for ever since '47. I bought that car in April of '47.

* * * *

Q How much did you pay for that car? A \$782.52.

Q Now, from the time you bought it in 1947 up until December the 11th, 1949, had it ever been involved in any other accident? A No, sir, no accidents.

* * * *

6 Q Was it legally parked? A It was legally parked.

Q You parked it, you say, about 10 p. m.? A Yes, sir.

* * * *

Q Now, when did you next receive information concerning your car? A Around 2:15 in the morning the officer came up and knocked on the door.

Q When you went out what did you find? A The car just smashed up, the whole front, the motor lying up to the right-hand side of the fender.

8 Q What ultimately did you do with it? A Well, the car was beyond repair, and I just sold it for salvage.

Q How much did you get for it for salvage? A \$70.

Cross Examination

BY MR. BARSE:

Q Mr. Porter, you say you didn't see the driver of the car until you went to the precinct? A To the police's car.

Q To the policeman's car? A Yes, sir.

9 Q And did you see the driver of the truck at that time? A They had the man in the car, says he was—they say he was driving the truck.

Q They said he was driving the truck? A Yes.

Q Did they tell you his name? A No, sir, they did not, not at that time.

Q Did you later find out what his name was? A Yes, sir, later on.

Q And what was his name? A Page Baylor.

10 L. A. Lewandowski

Direct Examination

Q And you are a member of the Metropolitan Police Force? A Yes, sir.

* * *

Q Directing your attention to December of 1949, to what precinct were you attached? A No. 3, sir.

Q Were you on duty about 2 a. m. Sunday morning, December 11th, 1949? A Yes, sir.

* * *

11 Q On arrival there what did you find? A Well, we found a car, I can't remember the plate number, but it was a Pontiac, and it was parked on the east side of Twenty-fifth Street approximately between 45, 50 feet from the intersection, and it had been knocked up on the sidewalk. The front end had been knocked in, and the left front had been damaged. And there was a truck parked, a Ford truck—I believe it was a Ford truck—parked on the—on the west side of Twenty-fifth Street approximately 200 feet down into Twenty-fifth Street, facing south.

Q Did you ascertain, from the position you found the Pontiac car in, whether it had been legally parked before this accident? A Yes, sir, it was legally parked.

* * *

12 Q Did I understand you to say that the impact was forcible enough to knock it up on the sidewalk? A To knock it up on the sidewalk, yes.

Q As a result of that backward motion did the Pontiac come in contact with any other car? A There was a car parked behind it, and it was damage done to the car behind it too; yes, sir.

* * *

Q Now, at that time did you interview or see the driver of this truck? A Well, when I got there there was a—a—as a matter of fact, we got a second call on that thing, and said that the driver of the vehicle was trying to get away. Well, when I got there the driver was pointed out to me by a witness, and he was up on

the steps of another house about—I would say approximately where the truck was parked and he was up in the doorway, knocking at the door; and I questioned the man on the—on the accident, and he just refused to tell me anything. He said he didn't know anything about it. Well, then he changed his story and he said that he was a passenger in the truck.

Q Did he ultimately admit that he was the driver—
A He did.

Q —at the time of the accident? A He did eventually, yes, sir.

Q What was his name? A Page Baylor.

Q Page T. Baylor; is that correct? A Yes, sir.

Q Was there anyone else in the truck at that time?
A No, sir, there was no one else in the truck.

Q Did he tell you whether or not there had been someone else in the truck with him at the time of the accident? A He said he was a passenger in the truck.

Q He was a passenger? A Yes, sir.

Q And led you to believe that someone else had been driving the car? A Yes, sir.

MR. BARSE: I object, your Honor.

THE COURT: No. Don't lead him.

* * * *

14 Q Now, what was the condition of the weather that morning? A It was pretty clear, sir.

Q The streets were dry? A Yes, sir.

Q And the intersection of Twenty-fifth and M Streets, is that well lit or poorly lit with artificial illumination?
A It's pretty well lit up.

* * * *

15

Cross Examination

BY MR. BARSE:

Q Officer Lewandowski, did you say that Baylor at one time stated that he was the driver, and that at another time he stated he was a passenger? A Well,

when I first questioned the man he said he was a passenger in the truck; he said there was someone else driving. When I questioned him on who the driver was he said he didn't know.

Q Well, am I mistaken in believing you testified that he later said that he was the driver of the car? A Yes, sir; about six o'clock in the morning, after we had him in the station, he admitted he was the driver.

* * * *

Redirect Examination

BY MR. DAVIS:

* * * *

16 Q Now, do you know the owner of the defendant's car, Mr. J. Fairfax Conrad, who has a place of business at 2002 P Street? A Yes, sir.

Q Did you contact him at any time shortly after the accident? A Yes, I did, sir.

* * * *

Q Did he tell you how his truck happened to be out at that time of the morning? A He was a little bit surprised that the truck was out that hour in the morning.

Q But he admitted ownership of the truck, did he? A Yes, sir.

* * * *

18 *Evidence on Behalf of the Defendant*

* * * *

J. Fairfax Conrad

* * * *

Direct Examination

BY MR. BARSE:

Q Will you state your full name, please, sir? A John Fairfax Conrad.

Q And your address, Mr. Conrad? What is your address, sir? A 2002 P Street, residence.

Q And you own a business, do you not, sir? A Yes, sir.

Q What business is that? A Hauling ashes and trash and selling cinders.

Q Now, in December of '49 what name was that business using? What was the name of your company? A J. F. Conrad Company.

* * * *

19 Q Now, what is the nature of your business, Mr. Conrad?

* * * *

A I just stated it; hauling ashes and trash and selling the cinders for block houses. Hauling.

Q And in that do you pick up cinders from business places? A I haul from the Government buildings and hotels and apartments.

Q And do you have more than one truck that is used in the business? A I have seven.

Q How many drivers do you have, sir? A Seven drivers. Seven or eight drivers.

Q Now, in December of '49 was George Washington employed by you as a driver? A Yes, sir.

Q Have your drivers ever been given any instructions, Mr. Conrad, as to the use of the trucks? A Yes, they have been instructed not to use them for private use or to use them for anything but what we tell them to do.

20 Q Have they been given any instructions with respect to other persons driving those trucks? A Never to allow anybody to drive it but the driver.

Q Were you actively engaged in your business last December, Mr. Conrad? A No, sir. Mr. Bazzle has been running my business about three years.

THE COURT: Mr. who?

THE WITNESS: Bazzle, B-a-z-z-l-e. I go down there occasionally, but he hires and fires and runs the business.

BY MR. BARSE:

Q Do you know Page T. Baylor? A I only saw him at No. 3 Precinct the day that he was—the night of the accident, or the morning.

Q Have you ever seen him since? A Never.

Q Has he ever been employed by you? A Never.

Q Has he ever to your knowledge driven any of your trucks? A Never.

MR. DAVIS: Just a moment. How would the witness know that?

THE COURT: Amend your question, "with your consent," Mr. Barse.

21 BY MR. BARSE:

Q Has Page Baylor ever driven any of your trucks with your consent? A No, sir.

MR. BARSE: I have no further questions.

* * * *

Cross Examination

BY MR. DAVIS:

Q Mr. Conrad, how long has George Washington been employed by you? A About 25 years.

Q 25 years. And in all that time has he been employed in the capacity of a driver? A Yes, sir.

Q Where does he live? A Over in Georgetown; I couldn't tell you exactly where.

Q 1021 Cecil Place, Northwest? A Yes, I think that's it.

Q That is in Georgetown? A Yes.

Q Do you know where Page T. Baylor lives? A No, sir.

Q Did you ever know where he lives? A No, sir.

22 Q You say Baylor has never been an employee of yours? A Never.

Q Now, in the 25 years that George Washington has been employed by you as a driver have you ever given him the use of any of your trucks for his own personal use, such as moving his furniture or anything of that kind? A No. * * *

Q On the 1st of December, 1949, where was Washington living? A At the same address, I imagine.

Q 1021 Cecil Place? A I imagine.

Q Where is he living now? A The same place.

Q The same address. Did he ask for authority to borrow the truck to move some of his own personal furniture over the week end of December the 23 10th? A No, sir, not—not to my knowledge. He never asked me.

Q I believe you said that for the last three years Mr. Bazzle has been running your business. A Yes.

Q And by that you mean you were not taking an active part in the management of your own business? A No.

Q So, what arrangement Washington may have had with Mr. Bazzle was not within your personal knowledge? A Yes.

Q Is Mr. Page T. Baylor here today? A Not that I know of.

Q Mr. Conrad, is Washington employed on a six- or seven-day-week basis? A Well, six and seven. He has to get—Walter Reed has to be picked up on Sundays and—

Q That is his regular assignment, is it, to— 24 A Well, mostly his.

Q To pick the ashes up? A But it could be one of the other drivers'.

Q Now, you live at 2002 P Street, your place of business. That is not open Saturday afternoons or Sunday, is it? A Well, the lot's not there. I live there, my residence. My lot and trucks are at 604 Twenty-fifth Street.

Q Is that open Saturday afternoons and Sundays? A Not open Sundays.

Q So that if any of your drivers, such as Washington in this case, has a Sunday assignment, he would necessarily have to keep the truck in his possession until Monday mornings; isn't that true? A Right.

Q So Washington had the truck over this particular week end with your knowledge and consent? A Not with mine; I didn't know.

25 Q Well, with your representative's? A Yes.

Q Your manager? A Yes.

MR. DAVIS: That is all.

MR. BARSE: If your Honor please, there is nothing to show that Washington had the truck with the knowledge and consent of the defendant.

MR. DAVIS: That is all, sir.

THE COURT: Well, any other questions?

* * * *

Willie A. Bazzle

* * * *

Direct Examination

BY MR. BARSE:

* * * *

26 Q And by whom are you employed, Mr. Bazzle?

A J. F. Conrad.

Q And what is your position with Mr. Conrad? A Manager.

Q Is that general manager? A General manager.

Q And how long have you been so employed? A Three years.

Q Going back to December 10th, of 1949, was George Washington employed by Mr. Conrad also at that time?

A Yes.

Q December 10th was a Saturday evening. Do you remember having a call to make on Sunday morning?

A Yes.

Q Will you tell us what that call was? A It was to remove cinders from the chute at Walter Reed Hospital.

* * *

Q Prior to that time had you ever had similar
27 hauls to make on Sunday morning? A Yes.

Q At the same place? A Right.

Q Is your lot open on Sundays? A No.

Q Now, when you had this Sunday morning call to make, what arrangements did you make for that on Saturday evening? A Well, George Washington was allowed to take the truck home in order to go to Walter Reed the first thing Sunday morning, to clean it.

Q What time was he supposed to be at Walter Reed? A Well, he was supposed to leave at seven o'clock or thereabouts.

Q And do you remember what time he left the lot Saturday evening? A Our quitting hour is five o'clock. It might have been an hour earlier, I can't say, but as a rule we quit around five.

Q And did Washington have any instructions at that time as to the use of the truck?

* * *

28 THE WITNESS: At that particular time he was not given definite instructions, but had been, of course, before.

* * *

Q Had Washington ever made similar calls for the Conrad Company? A Yes.

Q Now, at the time of those similar calls was he given instructions as to the use of the truck? A Yes.

MR. DAVIS: Now will you fix a time on that?

BY MR. BARSE:

Q Do you know, Mr. Bazzle, when prior calls were made? A Well, of course, during the winter
29 months calls are made like that through the entire winter, and—

Q Had any calls been made during the winter of 1949? A Yes, uh-huh.

Q Do you know at this time when those calls were made? A Well, they are made on every sunday, that is, during real cold weather.

* * * *

Q Had Washington made all these calls, or had anyone else made them? A Washington has made them all.

Q Now, had you ever given instructions to Washington on the occasion of those prior calls during the winter of 1949 as to the use of the truck? A Yes, uh-huh.

Q And what were those instructions? A To take the truck home and, of course, not to use it for anything else except the job that was given him to do.

Q Did he ever receive any instructions during the winter of 1949 concerning other persons driving the truck? A Yes.

Q And what were those instructions? A To let no one drive it, of course, except himself.

30 Q Now, on the occasion of the prior calls that Washington had to make on Sunday mornings, had you ever been advised or had you ever learned whether the truck was used for any purpose other than that of making a call? A So far as I know it's never been used otherwise.

Q Have you ever been advised or have you ever learned of anyone other than Washington driving the truck? A No.

* * * *

Cross-Examination

BY MR. DAVIS:

* * * *

31 Q And do you—does your company have a contract or a concession at Walter Reed Hospital to haul their ashes? A Yes.

Q And you say that that particular assignment is always performed on a Sunday? A The chute has to be cleaned every day in cold weather.

Q But the ashes are removed Sunday? A That is right, as well as any other day in the week.

Q That has been the exclusive assignment of George Washington, to haul those ashes from Walter Reed? A Yes.

Q How long have you had this contract—your company, rather—with Walter Reed? A I believe this is the third year.

Q Third year. So that at least for the last
32 three years it has been the practice of your company to permit Washington to take the truck that he drives regularly during the week home with him, is that right, on Saturdays? A At—in real cold weather.

Q Yes. In other words, he has the use of the truck over the week end with the company's knowledge and consent? A Yes, uh-huh.

MR. BARSE: I object to that, your Honor. He has not testified that he has the use of the truck over the week end with the company's knowledge and consent.

THE COURT: Use of the truck to do what with?

THE WITNESS: To go to Walter Reed and clean the pit.

BY MR. DAVIS:

Q Clean the pit? A Yes, that's right.

* * * *

33 Q So that to the best of your recollection Washington had taken this truck, which was his regular

truck, when the lot closed up, four or five Saturday afternoon? A Right.

Q He had the company's permission to drive it to his home at 1021 Cecil Place, Northwest? A Yes, uh-huh.

Q And then to go up to Walter Reed the next morning and pick up these ashes? A That is right.

Q Clean the boilers? A That is right.

Q And where was he to bring the ashes after they were loaded on the truck? A He was to take them to Kensington, yes.

Q Kensington, Maryland? A That is right.

Q So that he had authority of the company to go off the lot, out of the District of Columbia, on Sunday; is that right? A That's right.

Q And then, of course, after taking the ashes he had authority to drive back to his home, did he not? A
34 That's right.

Q Do you know a man by the name of Page T. Baylor? A No, I don't.

Q You don't know him at all? A No, sir.

Q Never saw him? A Never did.

Q Now, if Washington, on any of these week ends for the last three years, did use the car for any personal purpose of his own, such as moving his furniture or moving a friend's furniture, you wouldn't have any manner of knowing that unless he told you, would you? A That's right.

* * * *

Redirect Examination

* * * *

Q Mr. Davis asked you the question, Mr. Bazzle,
35 that summed up was this: Didn't Washington have the authority to take the truck home on Saturday nights, then to Walter Reed on Sunday mornings, then to Kensington, and then back home? And you answered that he did have that authority from the Conrad Company.

Did he have authority to do anything other than that with the truck? A No.

Q You also stated, I believe, that picking up ashes at Walter Reed was the exclusive assignment of Washington. Was he the only one that handled the Walter Reed ashes? A During the week ends, yes.

Q During the week did anyone else handle those? A During the week any other driver that might be available handled it.

Q And did Washington take this truck home every week end? A Not every week end, no.

Q Can you give us an idea of how often he did take it? A Well, it's entirely dependent on the weather. If it was real cold, of course, they make more cinders and it has to be cleaned. On a warm week end it wasn't necessary. So I'd say probably—

THE COURT: (Interposing.) You say not necessary. What do you mean by that? Not necessary to go there?

THE WITNESS: That is right.

36 THE COURT: Or not necessary for the driver to take the truck home?

THE WITNESS: Not necessary to go there.

THE COURT: To go to Walter Reed?

THE WITNESS: That is right.

* * * *

Recross Examination

BY MR. DAVIS:

Q Mr. Bazzle, in the last three years—or four years; excuse me—since you have been with the company, has it ever come to your attention that any of your company's seven or eight drivers have used your company's vehicles for their personal purposes? A No, it hasn't.

* * * *

Q Now, did you ascertain anything about an accident involving Washington's truck on the morning of December 11, Sunday morning? A I was called by the officer about three o'clock Sunday morning.

37 Q Did you contact Washington? A No, I didn't.

Q Well, did you talk to Washington Monday following this accident? A I believe I did.

Q Did you ask him how this truck of your employer's happened to be at Twenty-fifth and M Streets—

MR. BARSE: I object.

Q —at two o'clock Sunday morning?

MR. BARSE: I object.

THE COURT: I will let him answer.

MR. DAVIS: You may answer it, Mr. Bazzle.

A Well, of course it was explained to me before then, but George Washington explained to me, at the time that we met, what happened.

BY MR. DAVIS:

Q That was Monday morning? A As well as I can remember, it was on Monday morning.

Q And what did he say as to how the truck happened to be at Twenty-fifth and M Streets at two o'clock Sunday morning? A Well, as he explained it to me they were—uh—at a house up, I believe, off of Newport or Ward Place, sitting around talking, and they decided they wanted to have sandwiches and coffee, so one of the men got up and says, "I'll go after it"; and I believe
38 that George Washington gave him the keys to the truck to run up to the corner to get sandwiches and coffee.

* * * *

Q Did Washington tell you how the truck had gotten up to this party on Newport Place? A No.

Q Well, he didn't tell you that he didn't drive it there, did he? A No, he didn't.

Q It got there by his driving it? A I presume it did, yes.

Q Now, is Washington still employed by your company? A Yes, uh-huh.

* * * *

39

George Washington

* * * *

Direct Examination

BY MR. BARSE:

Q Will you state your full name, please? A George Washington.

* * * *

Q And where do you live? A 1021 Cecil Place, Northwest.

Q And how long have you lived there? A About couple of years; not quite couple of years.

Q And where are you employed? A J. F. Conrad Company, 604 Twenty-fifth Street.

Q Have you been employed by J. F. Conrad Company for how long? A For about 24 years, going on 25 years.

Q And what do you do for them, Mr. Washington? A Drive truck.

Q Now, going back to the evening of Saturday, 40 December 10th, 1949, do you remember that you took a truck out of the lot that night? A Yes, sir.

Q And why did you take it out of the lot? A Well, I had to go that Sunday morning about six-thirty and had to be at Walter Reed Hospital to clean a chute. Some ashes was in a chute out there. I have to clean it every Sunday morning, and especially in the winter.

Q And had you ever gone out to Walter Reed Hospital on Sunday mornings before? A Yes, sir, I had, uh-huh.

Q And on each of those occasions did you take a truck home with you on Saturday evening? A Yes, sir, I would.

* * *

Q Now, on the prior occasions when you had
41 to make a pick-up from Walter Reed and had to go down and ask for a truck out of the lot on Saturday evening, were you given any instructions as to the use of the truck? A Well, yes, sir. We had—we was supposed only to take 'em just to go to do the work that we was supposed to do with 'em, but no one tell you every time you can. That's your orders is given to you, and when you are hired on the job, what you are supposed to do.

Q But you had received instructions? A I have received instructions, yes, sir.

* * *

THE COURT: * * * What were the entire instructions that you received?

THE WITNESS: Well, we received instructions not to let anyone drive the trucks; yes, sir. And that's one of the main things that they tell us, not to let anyone drive the trucks. No one is supposed to drive a truck but the one that is using it.

* * *

Q Now, on the evening of December 10th, 1949, when you left the lot with the truck, where did you go? A I went to Twenty-first and Ward Place.

42 Q And what did you do at Twenty-first and Ward Place? A Well, I set there in the card game; I went there and played cards.

Q Now, was there anyone there by the name of Page Baylor? A Yes, sir.

* * *

Q Well, did Baylor leave twenty-first and Ward Place that evening? Did he have the room that you were in? A Yes, sir.

Q And where was he going? A Well, he was going to Twenty—to New Hampshire—to Wisconsin Avenue and M Street.

Q And why was he going there? A Well, just going there to pick up some cigarettes and sandwiches.

Q And how was he going to get there? A Well, he was going to drive. Told him he could get the key out of the truck.

THE COURT: Beg pardon. I didn't get that.

THE WITNESS: I was—er ah—he was to go there, but it was late and I told him to run up there, said
43 let him use the truck to run up there, and I told him yes, it would be all right to get the keys out of the jumper on the back of my chair, out of the back of my chair I was sitting in.

BY MR. BARSE:

Q And did he take the keys? A Yes, sir.

Q Now, did you see Baylor again? A Not until that morning around quarter to seven, six-thirty.

Q Where did you see him? A He was at the station house when I saw him.

* * * *

44

Cross-Examination

BY MR. DAVIS:

* * * *

45 Q Well, prior to living at 1021 Cecil Place where did you live? A 2414 G.

Q 2414 G? A Uh-huh.

Q Northwest? A Yes, sir.

Q How did you move your belongings from 2414 G to 1021 Cecil Place?

MR. BARSE: If your Honor please, I think he should first find out—

* * *

—when he moved.

46 THE COURT: Find out when, first.

MR. DAVIS: Two or three years. I think you said you have been at Cecil Place two or three years.

THE WITNESS: Yes.

BY MR. DAVIS:

Q All right. How did you move from 2414 G Street to 1021 Cecil Place? A In a taxicab.

Q Moved your furniture in a taxicab? A I had no furniture; I only carried my clothes.

Q Are you a married man? A I am now, but at that time I weren't.

Q How long have you been married? A I just had been married at that time a short while, and I just moved my clothes over there just about two weeks, a little—just a little before I—this accident here occurred, was when I moved my clothes over there. When I caried them over, I carried them over in a taxicab.

Q You mean nobody lived with you while you were at 2414? A No, sir; I lived with my mother.

* * *

Q Now, during the 24, 25 years that you have been driving a truck for Mr. Conrad, have you ever used
47 a truck for any of your own personal errands? A No, sir.

Q Never moved anything? A No.

Q Never have taken a small trip over a week end? A No, sir, never.

Q Never anything like that? A No, sir.

Q If you had done that would you tell Mr. Bazzle about it? A If I had done that, would I?

Q Yes. A Yes, sir, I would tell him about it.

Q * * * How long have you known Page T. Baylor?
A About—I would say about four, five years.

• • • •

48 Q You went directly from the lot to this party at Twenty-first and Ward Place? A Yes, sir.

Q So you disobeyed your employer's instructions immediately, did you not? A Well, now, wait a minute. I don't think my employer has any reason why that he should tell me where to go and when to go. Maybe if you mean by me going there and not carrying the truck where he sent me, he didn't tell me directly, see, just where to go. He did not on that morning, and I didn't go straight home; I went from work right there where I going to play cards.

Q What kind of party was this, if you recall? A It was no party. It was a poker game. We had a poker game there, playing poker.

• • • •

49 Q What time did you get off work on Saturday, December the 10th? A Well, now, I left the yard—I got off from work about quarter to five, after scaling my truck up, getting gas and stuff ready for Sunday morning, I left the yard about twenty minutes after five, something like that.

• • • •

Q How long did it take you to get from there to Twenty-first and Ward Place? A Well, not more than about ten minutes, at the most.

Q You got there, then, about five-thirty? A Yes.

Q And were you there continuously until Baylor left for these sandwiches and cigarettes? A I was there continuously until about—about six o'clock that morning I went out trying to find him in my truck.

Q Were you playing poker all that time? A Yes, sir.

• • • •

50 Q Was there any reason why you couldn't have gone for these sandwiches and cigarettes? A I had money involved on the table and I just didn't care to leave, myself, if you want to know the facts about it. The money was too great. I was there playing for money. I wasn't there betting for fun, you know.

Q So you decided to send Baylor for them? A Yes, sir.

Q He was the messenger boy for the party? A Yes, sir, but not by my order. He just asked me a favor and I granted it.

Q Where did you say the keys for the truck were at that time? A In my jumper pocket hanging on the back of the chair I was sitting in.

Q You told Baylor where the keys were? A Yes, sir; I told him to look in my jumper pocket.

Q So he got the keys, then took the truck? A Absolutely.

Q So you knew he had the truck, didn't you? A That is right.

51 Q And you didn't hear from him again until six o'clock that morning? A That is right. He never got back, and I went hunting for him at six o'clock that morning.

Q Now, did anybody go with him to get these sandwiches? A Not as I know of. He left there alone. I can vouch for that.

Q When you saw Baylor at six o'clock in the morning, where was he, at the precinct or at the scene of the accident? A Well, now, it was a little later than six o'clock in the morning when I saw Baylor at the precinct.

Q At the precinct? A Yes, sir. It was later than six o'clock in the morning.

* * *

52 Q Now, after you saw Baylor at No. 3 Precinct did he tell you where the truck was? A No, sir,

he didn't. I got that information at the precinct, from the officer who arrested Baylor.

Q They told you it was at Twenty-fifth and M? A Yes, sir.

Q And did you go over there? A Yes, sir; I went over there after that and got the truck.

Q Was the truck able to be driven? A Able to be driven. Slightly damaged; it was to the fender.

Q What time did you get to the scene of the accident at Twenty-fifth and M Streets? A Well, I guess it was around five or ten after seven.

Q What did you do then? A I got the truck, looked at the truck and seen it was—could be driven, so I got in the truck, went on out there, and did the work
53 that I had to do.

Q You went out to Walter Reed? A Yes, sir.

Q Now, at any time that Sunday did you contact either Mr. Conrad or Mr. Bazzle? A No, sir, I didn't. I talked to Mr. Conrad that morning at the station house.

Q That Sunday morning? A Yes, sir.

Q Was that before you left for Walter Reed? A That was before I went to Walter Reed.

Q And was Mr. Conrad at the precinct, did you say? A When I got there he was there.

Q And was Mr. Baylor there too? A Baylor was there, yes, sir.

. . . .

Q Is Mr. Baylor here in court today? A I don't know, sir. I haven't seen him.

Q Where does he live? A 1269 Twenty-fifth
54 Street, Northwest.

Q When did you see him last? A It has been about five weeks ago now.

. . . .

Q How long has he lived at that address that you just gave?

* * * *

A But I can remember him being there at least a couple of years, anyway, to my knowing.

* * * *

Q And he was in Washington then? A Yes, sir.

* * * *

55 Mr. Barse: That is the defendant's case.

* * * *

Evidence on Behalf of Plaintiff in Rebuttal

* * * *

Jasper Porter,

* * * *

Direct Examination

BY MR. DAVIS:

Q Did you notice the witness who just preceded you, George Washington? A Yes, sir.

* * * *

56 Q Did you know him prior to this accident?

A I never knew him before the accident occurred.

Q When was the first time you saw him? A On the morning when they came down to Traffic Court to try—

THE COURT: No. The morning they came to Traffic Court; is that right?

THE WITNESS: Yes, sir.

BY MR. DAVIS:

Q And at that time did you have a conversation with him? A On the way back home him and I rode in the same streetcar back to Twenty-fifth and M, or Twenty-fifth and Washington Circle.

Q What if anything did he tell you as to how he happened to have this truck in his custody over the week end of this accident?

MR. BARSE: Just a minute. I object, your Honor.

* * *

57 THE COURT: I will let him answer.

* * *

THE COURT: Do you understand the question now?

THE WITNESS: He wants to know why, did he tell me, how did he have the truck in his custody?

THE COURT: That's right.

A Well, he didn't tell me altogether. He said that he was going to do a moving job on a Sunday
58 morning, or something like that, but he didn't say just what this moving job were, the reason he had the truck.

* * *

Plaintiff's Case Reopened

* * *

Neil G. Schreiner,

* * *

Direct Examination

* * *

BY MR. DAVIS:

* * *

Q Where do you live, sir? A 4581 MacArthur Boulevard.

Q What is your occupation? A Clerk in the Government.

* * *

59 Q Mr. Schreiner, directing your attention to the early morning of Sunday, December 11, 1949, about 2 a. m., did you have occasion to be in the vicinity of Twenty-fifth and M Streets, Northwest,— A Yes, sir.

Q —about that time?

Were you on foot or in another automobile? A I was driving.

* * *

Q * * *

Now, what if anything unusual did you notice as you were on your way home that morning at the intersection of Twenty-fifth and M Streets, Northwest? A Only that there seemed to be a collision within the vicinity, and as I went by I looked down Twenty-fifth Street to notice a truck against car, and turned around to come back to see if I could be of assistance.

* * *

61 Q Now, when you came back did you see the truck that had been in the collision? A As I approached the corner to make a right turn into Twenty-fifth Street I noticed the truck was backing away from the car and heading south on Twenty-fifth Street.

Q What did you do then? A I then pursued him and pulled him over to the curb.

Q How far did you have to pursue him? A Probably two hundred feet.

Q And how, in what manner, did you pull him to the curb? A Went up alongside of him and blew my horn, cut him off.

Q Did he stop as a result of that? A Cut him off, and he stopped, yes.

* * *

62 Q Well, did he come back to the scene of the accident with you? A Well, he went to look for the owner of the car.

Q And did you remain at the scene of the accident—
A Yes, sir.

Q —until the police arrived? A Yes, sir.

* * *

63 BY THE COURT:

Q How many people were in the car after you headed south and stopped two hundred feet from the point of impact? A One, sir.

Q Beg pardon. A One.

Q One person? A Yes, sir.

Q And that was the driver of the car? A Yes, sir.

* * *

Q Did the man who was on this truck ever admit in the presence of the officer that he was the driver? A No, sir, he didn't.

BY THE COURT:

Q Did you actually see him under the wheel, driving the car? A I did, sir.

* * *

67

Page T. Baylor,

* * *

Direct Examination

BY MR. DAVIS:

Q Will you state your full name, please?

* * *

THE WITNESS: Page Thomas Baylor.

* * *

Q Where do you live? A 1269 Twenty-fifth Street, Northwest.

* * *

68 Q By whom were you employed on December 11, 1949? A Goldenberg's.

* * *

Q And in what capacity? A In what capacity?

Q Yes. A Well, I was a warehouse helper there.

* * *

69 Q Do you know a man by the name of George Washington? A I do.

* * *

71 Q Now, directing your attention to December the 11th, 1949, a Sunday morning, where had you been late Saturday night and the early part of that Sunday morning? A Where I had been? I hadn't been anywhere but home, and from there I went with the truck and went to—

THE COURT: You are letting your voice drop.

A I hadn't been anywhere except home, down to the wharf and back.

* * *

Q Did you work at Goldenberg's that Saturday? A I worked there Saturday, yes.

Q What time did you get off duty? A I am off duty at four o'clock; five o'clock, rather, but I was off at four that day.

* * *

Q And where did you go after you got off work? A Home.

Q You went to your address on Twenty-fifth? A That is right.

* * *

72 Q Did there ever come a time when you left your home that Saturday? A I did.

Q Where did you go after that? A When I left it was at night, way late. It was after hours of twelve or so.

Q It was after twelve o'clock? A That is right.

Q And where did you go after you left your home on Twenty fifth Street after midnight that Saturday? A Where did I go?

Q Yes. A I went to Southwest and down to the—to a restaurant they call the Cadillac, named "Cadillac."

Q And how long did you stay at that restaurant? A Not very long.

Q Do you remember what time you got there? A I couldn't say.

Q You left your home at midnight? A I knew it was after twelve.

Q Went to a restaurant in Southwest? A
73 Yes.

Q Where did you go after you left that restaurant? A I came home, was coming home, and that's when the accident occurred.

Q How did you get from your home on Twenty-fifth Street to this restaurant? A I had the car, the truck.

Q You had the truck? A Yes.

Q Whose truck? A Well, I don't know. All I knew is, a friend, which was George Washington, had the truck, and he let me have the truck.

Q You got it from George Washington? A Yes.

* * * *

THE WITNESS: Washington was my friend, and he let me have the truck. That is how I got there.

BY MR. DAVIS:

Q What time that Saturday did you get the truck from your friend George Washington? A Just around about twelve o'clock when I left the house.

74 Q When you left your house? A That is right.

Q On Twenty-fifth Street? A That's right.

Q Had Washington been at your house? A What's that?

Q Was Washington at your house that night? A Was Washington at my house that night?

Q Yes. A Yes, Washington had been there at my house that night.

Q At any time were you at a poker game up on Ward Street, Porter Street, or Water Street? A I had no poker game.

THE COURT: You what?

THE WITNESS: I had no poker game.

BY MR. DAVIS:

Q My question was: At any time were you at a house on Ward—Ward Place? A No, I was no place of Ward.

Q Between Twenty-second and Twenty-third, N and O? A No.

Q That night? A No.

75 Q At any time that night were you at a poker party that your friend George Washington was attending? A Well, I don't know. I wasn't there at no party, no.

Q My question was: Did you see Washington playing poker at any time at a place on Ward Place? A I didn't see Washington playing no poker. No, I didn't see him play the poker.

Q What time did you say Washington gave you this—the use of this truck at your home? A Around about twelve o'clock.

Q Twelve o'clock midnight? A Just about a little before the accident occurred, whatever the time was at the time of the—just the minute I couldn't tell you.

Q Well, then you went to a restaurant in the southwest section of the city? A That is right.

* * * *

76 Q You didn't steal this truck, did you? A I did not.

Q Where did you get the keys, the ignition keys, from? A From Washington.

Q Washington? A Yes.

Q And you are sure you were at your home at that time? A That is right.

* * * *

81 Q Now, later on that morning did you talk to anybody at No. 3 Precinct about this accident? A Talk to anyone? Yeah, I talked to several people.

Q Did you talk to George Washington? A I did.

* * * *

82 Did you talk to anybody else besides Washington about the accident? A Not as I recall. I talked to the officers; that's all, Mister, and—

Q Did you ever see this gentleman here on the first bench (indicating)? A I recognize him but I don't know him.

Q Did you talk to him that night? A Yeah, I talked to him.

Q At No. 3 Precinct? A No. 3 Precinct. Him and George Washington were together.

Q Him and George Washington were together? A Yes, when I spoke.

Q Do you know Mr. Bazzle? A No, I don't.

Q George Washington's boss? A No, I don't.

83 Q Never talked to him, did you? A No, not to recall.

* * * *

Cross Examination

BY MR. BARSE:

Q Mr. Baylor. A Yeah.

Q Did anyone other than Washington ever give you permission to drive this truck on the night in question?

A No, they hadn't.

Q Have you ever seen Mr. Conrad, the gentleman sit-

ting here in the front bench, before today—or before that night at the precinct? A No, I haven't.

Q Had he ever given you permission to drive any of his trucks? A No, he hadn't.

* * * *

Charge to the Jury

THE COURT: (Quinn, J.): Well, now, ladies and gentlemen of the jury, you have now reached that stage in the case that you reach in every case where it becomes the duty, the function, and responsibility of the Court to give you the law in the case, because in a jury case you are twelve individual jurors—judges. The parties to this case didn't want the opinion of counsel, they didn't want the opinion of the Court; they wanted a jury to try this case, and that's why you were sworn in this morning to listen to the facts, to weigh the testimony, and then to follow the instructions of the law as the Court will give it to you.

Now, what do you have here? You have here an action by a plaintiff in the person of Jasper Porter, who sues whom? He sues J. Fairfax Conrad, and you will call him the defendant. And he sues him for what?

He says in substance, "Here: on December 11, 1949, I had an automobile parked outside of my house over in Georgetown in the City of Washington, and sometime after I parked it there, around two o'clock or two-fifteen in the morning, that car was damaged, and it was damaged by one of your trucks, and therefore I want you to pay me \$479." When you strip this thing of all its

85 legal technicality, that in substance is what he says. "And therefore I am bringing suit in the sum of \$479, and I want that money from you."

Now, what does Mr. Conrad say, the defendant?

He says, "Yes, I won't deny that I owned a fleet of trucks, dump trucks. I'll admit that on December the

11th, 1949, one of my trucks was in collision with your automobile that was parked in front of your house over in Georgetown. But I deny that I'm responsible. I'll admit that that car was turned over to one of my employees, and the name of that employee was Washington, George Washington; that when that car was turned over to George Washington certain instructions were given to him as to what to do with it. He was to go to Walter Reed Hospital and to get some ashes out of the chute there and take them over to some place in Maryland. In violation of my instructions he turned the truck over, now it develops, to someone else; and, therefore, I, neither by express consent or by implication or implied consent, gave any authority to Baylor to drive my truck. Therefore I don't believe that I owe you anything."

Now, that's Mr. Conrad's defense in substance; when you strip it right down that's what he says.

There, ladies and gentlemen, you have a lawsuit. Mr. Porter claims that Mr. Conrad owes him that money. Mr. Conrad says, "No, I don't owe you any money."

Now, he is suing, you will notice, Mr. Conrad.
 86 He isn't suing Washington, he isn't suing Baylor; he is suing Mr. Conrad. So, he has got to stand or fall on that suit. Now, he is bringing that action against Mr. *Conrad* under what was pointed out to you, an act which was passed here in the District of Columbia, I think in 1935, which is known as the District of Columbia Financial Responsibility Act, and the pertinent part of that act which applies to this case reads something like this:

Whenever any motor vehicle shall be operated by any person other than the owner—whenever any motor vehicle shall be operated by any person other than the owner, with the consent of the owner, expressed or implied, the operator thereof shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle, and

the proof of ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner.

Now, that means just exactly what it says. But what does that act legally do? When Congress passed that act what was the legal effect of it?

The legal effect of that act simply did this: It shifted the burden of proof and it imposed on the defendant, in this case Mr. Conrad, the affirmative duty of proving that the car, or the truck in this case, was not at 87 the time of the accident operated with his expressed or implied consent. It shifts the burden over onto Mr. Conrad, and he must show by a preponderance of the evidence that Baylor at the time of the accident was operating that car without his consent, either expressed or implied. That's what that portion of the act does, nothing more and nothing less. And I am merely citing that because appellate tribunals, higher courts than this court, have said that, in effect.

Now, Mr. Porter must first show—there is no question here, there's no contest at all but what there was an accident. No one is fighting about that at all. Mr. Conrad says there was an accident; Mr. Porter says, "My car was damaged as the result of an accident." There is no contest here but what it occurred on December the 11th, sometime in the early-hour morning; there is no contest here but what the car was parked over there, Mr. Porter's car; and there is no contest here but what the striking car, the truck, was the property of Mr. Conrad. Those things have all been stipulated and agreed upon, and the only question, the question of fact for you to decide, is simply this:

First of all, was the car operated—the truck operated negligently by Baylor? Was this accident brought about by his negligence?

That's the first thing you have got to decide. And negligence is simply this: Negligence is the doing
 88 of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those circumstances which ordinarily regulate the conduct of human affairs. It's the failure to use ordinary care in the management of one's property or person. That's negligence.

Now, Mr. Porter must first show to your satisfaction by a preponderance of the evidence that this accident was brought about, first, by the negligence of the driver of that truck.

Now, preponderance of evidence means simply this: Preponderance of evidence means that you must be reasonably satisfied that his allegations are true. You must be reasonably satisfied that his allegations are true. That's a short, concise definition of preponderance of evidence.

Now, that doesn't mean that one side, either the plaintiff or the defendant, must produce the larger number of witnesses, but, as I have stated, merely that you must be reasonably satisfied of the truth of the allegations of the complaint.

To state that in another way, preponderance of evidence means evidence of a greater convincing force. Preponderance of evidence means evidence of a greater convincing force. It's the duty of the jury to weigh the evidence carefully and to find a verdict in whose favor the evidence preponderates. That's just, as pointed out by counsel, if it tilts just even a little, then in the eyes of
 89 the law the burden of proof has been met. However, if it's absolutely stationary, even, then—if it's evenly balanced, then in the eyes of the law the burden of proof has not been carried.

So, how do you go about trying to find out, first, whether a party to a lawsuit has carried the burden of

proof? Well, you do that by weighing evidence or weighing the testimony. And how do you go about weighing testimony? Well, you do that simply by observing the witnesses that are brought here by both sides, observing their demeanor and manner of testifying, whether you think they are honestly and sincerely trying to tell you what they saw and heard, their attitude, their demeanor on the stand, their frankness or lack of it, fairness or lack of it, as the case may be; and those are the various denominators that you can use in determining how much weight you will give the testimony.

Now, in this case here if you find that Mr. Porter shows to your satisfaction by a preponderance of the evidence that this was brought about by the negligence of the operator of Mr. Conrad's car, then under this Financial Responsibility Act the burden then shifts over to Mr. Conrad and he must show to you by a preponderance of the evidence that Mr. Baylor at the time of this accident was not operating his truck on December the 11th, 1949, in the early hour morning—in the early hours of that morning, in Georgetown, with his consent, expressed or implied.

90 Now, you all know what express consent means.

If I ask you if that is your hat and you say yes, and I ask you if you will give me your hat and you say yes, you have an express consent. Or if you have an automobile and I come to you and say, "May I borrow your automobile?" and you say, "Yes," and give me the keys to that car, that means that I have your express consent.

Now, implied consent is brought about by a set of circumstances or conditions that imply that I have it.

Now, there is no doubt here at all but what Mr. George Washington had that car with the express consent of Mr. Conrad or the manager or agent of Mr. Conrad, because there is no testimony here that refutes the testimony that George Washington was to do a certain thing with

that truck on Sunday morning, namely, to go to Walter Reed Hospital to get some ashes and take them over into Maryland.

Now, if those were the instructions and Mr. Conrad has shown that by a preponderance of evidence, to your satisfaction, or evidence of more convincing force than that opposed to it, and that those were the instructions laid down, the instructions given to George Washington, and that he violated those instructions and deviated from the course of instructions that he was instructed to follow, then Mr. Conrad cannot be held responsible for this damage that was done to Mr. Porter's car.

91 For instance, or for example, you have an automobile and you have a clerk working for you, and you give him the keys to that car and tell him to go to Emergency Hospital right now and to pick up at Emergency Hospital a certain package that will have your name, in custody of the clerk at the hospital, and you are called at five o'clock tonight and told that that clerk of yours just ran into an automobile out in Silver Spring and has done \$479 worth of damage, they couldn't hold you responsible if you could show by a preponderance of the evidence that you gave him implicit instructions to go to Emergency Hospital and he violated those instructions and the first thing you knew he was out Georgia Avenue extended. He might be responsible, but you wouldn't.

Now, if you didn't give him any instructions, either expressed or implied, as to what to do, and you gave him carte blanche authority to go anywhere he wanted to, then you would be responsible. But if you laid down specific instructions for him and he followed those—and I am sure that if you just think that through logically you will see the logic behind it.

Now, as I said at the outset, the parties to this suit didn't want the opinion of counsel, they didn't want the opinion of the Court. They wanted you, twelve indi-

vidual jurors and for all practical purposes twelve individual judges, to try this question of fact, because in a jury case all the court does or the judge does
 92 is merely to rule first upon the admissibility of evidence and to instruct the jury as to the law; and if they follow the instructions as laid down by the court there is no tribunal, regardless of how high, and I mean the Supreme Court of the United States, can disturb a finding of fact by a jury. Now, if a court or a judge makes an error in either admitting or excluding evidence, there is always a tribunal that can correct any error that the trial court makes. But that's on a question of law, not on a question of fact. And you are the triers of the fact.

Now, this case is important to both of these individuals. It's important to Porter and it's equally important to Mr. Conrad. This is their day in court. This is the day that they have to determine whether Mr. Conrad has to pay Mr. Porter \$479, because Mr. Conrad is the one that Mr. Porter sued. He sued no one else. He sued Mr. Conrad. Therefore he must stand or fall on that suit. Now, that doesn't mean that he can't sue anyone else. It wouldn't be res judicata as to anyone else, but your verdict would make it res judicata or final as to Mr. Conrad.

Now, if you're satisfied—first you have to weigh the evidence. Has Mr. Porter satisfied you that there was negligence, that this accident was brought about by the negligence of Mr. Baylor, by a preponderance of the evidence? If he has, then you have to go a step further.
 93 If he has not, the bottom of the barrel drops out and you go no further: you stop right there; you don't have to go any further.

But if he has shown to your satisfaction—and I am not going over the evidence, because it is just as fresh in your mind as it is in mine, and, as pointed out by counsel a moment ago, it isn't my recollection that gov-

erns; it's your recollection on the facts or on the testimony; and if anything that I have said differs from your recollection, disregard mine, use your own recollection; and if anything that counsel said, either of them, in summing up the case, is not supported by the evidence, disregard that; because the law permits counsel to argue a case, for what reason? Merely to assist and help the jury, jurors, or the individual jurors, to give you their idea and to give you their suggestions. The law doesn't permit a transfer of the responsibility of deciding a case over to the lawyers, no. You can disregard any statement that counsel makes, or both of them, if it is not supported by the testimony.

Now, if you find that Mr. Porter has sustained the burden, then you go a step further. Then the burden of proof goes over to Mr. Conrad. If he has shown to you to your satisfaction, by a preponderance of the evidence, evidence of a more convincing force than that opposed to it, that Baylor was driving that car on the morning of December the 11th, 1949, and he at the time of 94 the accident did not have his authority, either expressed or implied, if he has carried the burden on that, then your verdict would have to be for Mr. Conrad.

Now, that's about the law on the case, ladies and gentlemen of the jury. You have seen the witnesses, you have heard them testify, and I think the best advice that I can give is to go out, weigh the testimony, weigh it carefully, go over it; and if and when you arrive at a verdict, if you arrive at a verdict it will have to be for \$479, because both parties have stipulated that that's the amount. Can't be any other amount. They have stipulated on that, and that's an agreement, a stipulation.

• • • •

No. 10,989

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

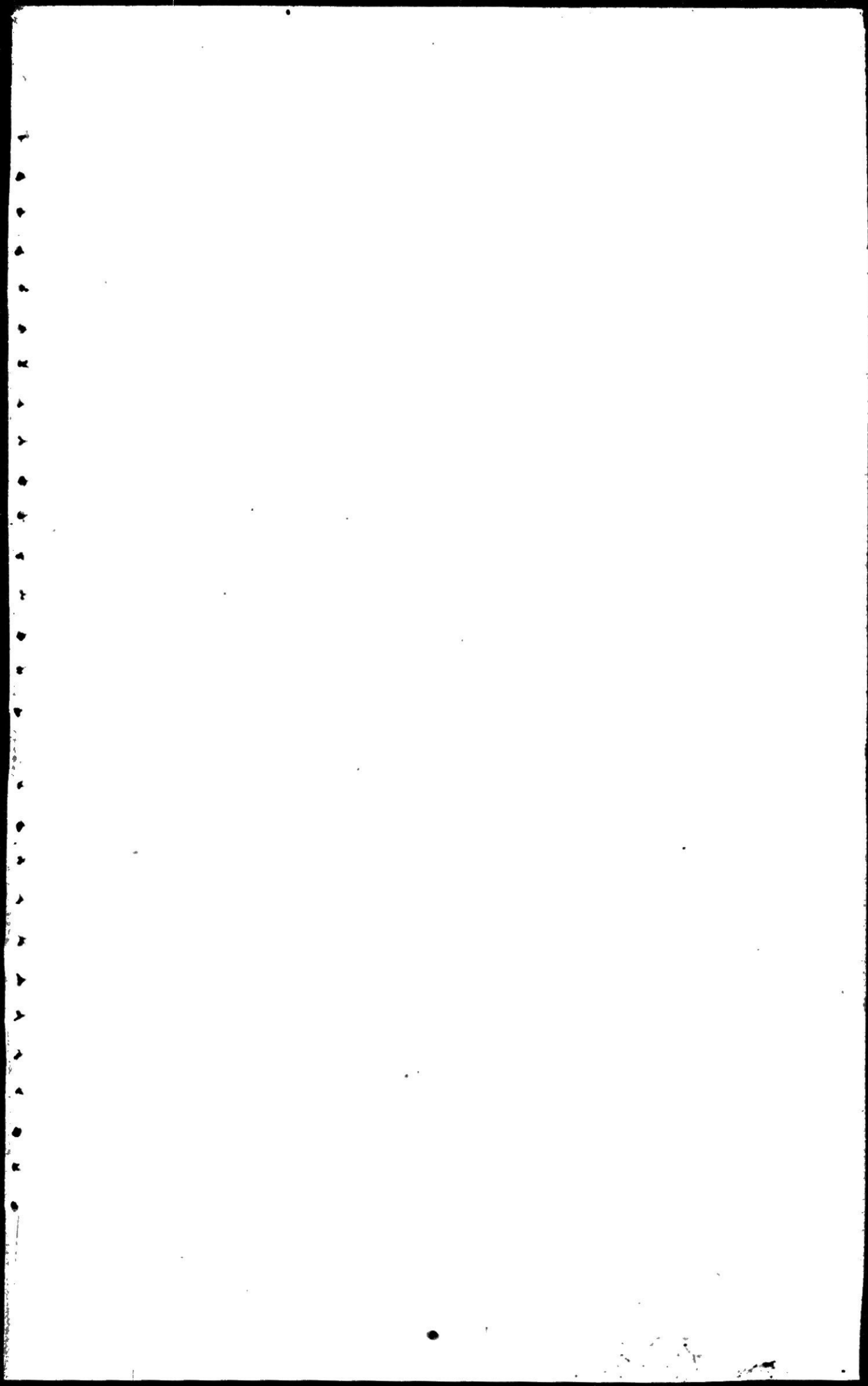
JASPER PORTER, *Appellant*, v. 9 1951
FILED

v.

J. FAIRFAX CONRAD, *Appellee*. *Joseph H. Stewart*
CLERK

**Appeal from the Municipal Court of Appeals
for the District of Columbia**

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No. 10,989

**APPELLEE'S STATEMENT OF
QUESTIONS PRESENTED**

In the opinion of Appellee, the only question presented is as follows:

Whether a person who has been damaged by the negligent operation of a motor vehicle in the District of Columbia by someone other than the owner makes out a case against said owner sufficient to be submitted to the jury, where said person relies entirely upon the "presumption of consent" arising from Title 40-403, D. C. Code, 1940 Edition, in the face of uncontradicted proof by the owner that the vehicle at the time of the accident was not being operated with his permission.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,989

JASPER PORTER, *Appellant*,

v.

J. FAIRFAX CONRAD, *Appellee*.

Appeal from the Municipal Court of Appeals
for the District of Columbia

BRIEF FOR APPELLEE

COUNTER STATEMENT OF THE CASE

Before the commencement of the trial in the Municipal Court, it was stipulated by both parties that the amount of damages to plaintiff's automobile was Four Hundred Seventy-Nine Dollars (\$479.00), and that plaintiff would not have to introduce formal proof of such damages; it was also stipulated that the defendant was the owner

of the motor truck that struck plaintiff's vehicle causing damages in the above amount.

Plaintiff, through his witnesses only introduced evidence tending to show that the accident had occurred and that Baylor, the operator of defendant's truck, was negligent, which latter fact was not in dispute in the Municipal Court of Appeals and is not disputed here.

The plaintiff rested and evidence on defendant's behalf was received from J. Fairfax Conrad, the defendant, Willie A. Bazzle, and George Washington.

Defendant Conrad testified that he was the owner, in December, 1949 of a business engaged in hauling ashes and trash and selling cinders. He has seven trucks that are used in the business and seven or eight drivers, one of whom is George Washington. All of these drivers have been instructed not to use the trucks for "private use or to use them for anything but what we tell them to do," (16A), and never to allow anyone else to drive them (16A). George Washington had been employed by him as a truck driver for about twenty-five years (17A) and in this time Washington had never been given the use of any of the defendant's trucks for his own personal use, nor did he ask Conrad for authority so to use a truck over the week-end of December 10th, 1949 (18A). At the time of the accident Mr. Conrad was not actively engaged in his business, but it was run by his general manager, Willie A. Bazzle.

Bazzle testified that the defendant had a contract with Walter Reed Hospital to clean ashes from the chute and remove them. This had to be done every day during cold weather (22A). Such a call had to be made on Sunday, December 11, 1949 (20A), and defendant's lot not being open on Sundays (20A), Mr. Bazzle made arrangements on Saturday evening, December 10th, whereby George Washington was allowed to take the truck home with him that night "in order to go to Walter Reed the

first thing Sunday morning, to clean it." (20A). Washington had had to make similar Sunday morning calls every cold day during the winter of 1949 (20A-21A) and on the occasion of these prior calls he had been given instructions as to the use of the truck, that he was to take it home with him, that he was not to use it for anything but the assigned job, and that no one except himself was to drive it (21A). Bazzle had never been advised or ever learned whether the truck was used for any purpose other than that of making a call, and as far as he knew it had never been used otherwise (21A). Nor had he ever learned or been advised of anyone other than Washington driving the truck (21A). When it was necessary for Washington to make Sunday calls to Walter Reed, he had the use of defendant's truck to take home with him on Saturday night, go to Walter Reed Sunday morning and clean the pit, take the ashes to Kensington, Maryland, and drive back to his home (22A-23A) but he did not have the authority to do anything other than that with the truck (23A-24A). During the period Bazzle had been with the company, it had never come to his attention that any of the company's seven or eight drivers had ever used the company's vehicles for their personal purposes (24A).

George Washington, called by defendant, testified that he had worked for the defendant for about 24 years. On the evening of Saturday, December 10th, 1949 he took one of defendant's trucks out of the lot with him (26A) about 5:20 P. M. (30A) for the purpose of going to Walter Reed the next morning to clean ashes from a chute (26A). He had had similar assignments on prior occasions (26A). On these occasions he was given instructions to use the truck only for the assigned job, and to let no one else drive it (27A).

Instead of going home with the truck, Washington went directly to 21st and Ward Place, N. W., arriving

about 5:30 P. M., got into a poker game there, and did not leave until about 6:00 A. M. the next morning (27A, 30A). Page Baylor was at the same address as Washington, and sometime during the night he asked Washington to let him take the truck, which Washington did, telling him to get the keys out of his jacket, and Baylor left to go out after some things (27A-28A, 31A). Washington did not see Baylor again until about 6:00 A. M. at the police station. The police told Washington where the truck was, he went and got it, and then went to Walter Reed to do the assigned job (28A, 31A, 32A).

During Washington's employment by the defendant he had never used a truck for any personal errands or "anything like that," (29A).

Plaintiff re-opened his case to introduce the testimony of two witnesses: Neil G. Schreiner and Page T. Baylor. Schreiner testified only about the physical facts of the accident, identifying Baylor as the driver and only occupant of the truck at the time of the accident.

Baylor testified that on the night of December 10th, 1949 Washington had been at his house at 1269 25th Street, N. W., and that he did not see Washington playing poker (39A). About midnight, Washington let him have the truck (38A), and he drove to a restaurant in southwest Washington (38A) where he bought and ate some sandwiches (R 75-76.) On his way back from the restaurant the accident occurred (38A). The defendant had never given him permission to drive any of his trucks and no one other than Washington gave him permission to drive defendant's truck on the night of the accident (40A-41A).

Appellant's gratuitous statement that Baylor was never prosecuted for "Unauthorized use" of the vehicle had no bearing whatsoever on the question involved herein, was

not in evidence before the jury, and indeed could not have been put before them.

Defendant's motion for a directed verdict at the close of all the evidence was denied, and the matter being submitted to the jury, they found for the plaintiff for the stipulated amount.

Defendant's motion to set aside the verdict and for judgment for the defendant N. O. V. or in the alternative for a new trial was denied and judgment entered on the verdict for the plaintiff.

On appeal to the Municipal Court of Appeals for the District of Columbia this judgment was reversed with instructions to enter judgment for the defendant.

SUMMARY OF ARGUMENT

Appellant raises three points in his Statement of Questions Presented which he submits are the issues in this cause. Appellee submits that these questions are not involved in the case, and are not supported by the authorities upon which Appellant relies.

The only question to be determined is whether, as a matter of law, a verdict should have been directed for the appellee (defendant). The Municipal Court of Appeals in so ruling, followed the applicable law on the subject as laid down by Congress and this Court.

ARGUMENT

In his argument I, appellant cites a number of decisions from other jurisdictions which, he informs the Court, have Financial Responsibility Statutes similar to our own. These cases are distinguishable from this cause either on the facts or the statutes under which they were decided, and are therefore not authoritative in aiding this Court to dispose of the instant case.

In *Crockett v. U. S.*, 116 F. 2d. 646, there is nothing to indicate that the owner had instructed the salesman not to let anyone else drive the automobile. And certainly such instruction would not be given, for an automobile dealer expects his salesmen to allow prospective purchasers to drive, which is exactly what the situation was in the case.

Aarons v. Standard Varnish, 163 Misc. 84, 296 N. Y. S. 312, is also silent on the question of whether limitations were imposed upon the operation of the vehicle by other persons. And the important point in the case was that the owner was a corporation capable of acting only through its agents, and that act of the salesman in permitting another to drive was the act of the corporation itself.

Appellant cites a number of other "Financial Responsibility Act" cases in Argument I, which fall generally into two distinct classifications:

(A). Those such as *Hall v. McDonald*, 229 Wisc. 472, 282 N. W. 561, and *Scheuing v. Challiss*, Tex. Civ. App., 102 S. W. 2d 477, where the issue before the court and jury was negligence of the servant (*Scheuing v. Challiss*), or authorized driver (*Hall v. McDonald*), in placing at the wheel an "incompetent substitute" (*Hall v. McDonald*), or a "substitute without skill and experience" (*Scheuing v. Challiss*). The same contention was urged upon the Municipal Court of Appeals by Petitioner herein and that Court answered it in the last paragraph of its decision, stating:

"We think we should add plaintiff seeks to support the verdict of the jury in plaintiff's behalf and the submission of the case to the jury on the theory that defendant was negligent in turning the truck over to Washington for the weekend, Washington in turn was negligent in turning the truck over to Baylor and that such negligence was a proximate

cause of the accident. We believe, however, that neither the pleadings nor the proof justifies such a conclusion."

Respondent respectfully submits that a perusal of the reporter's transcript and the pleadings amply supports the above statement by the Municipal Court of Appeals, and reveals that the only issue presented to the jury in this cause was that of "consent" under the Financial Responsibility Act.

(B). Those decisions which distinguish between "use" and "operation". California provides the majority of the decided cases making this distinction, and perhaps the leading single case on the point is *Souza v. Corti*, 22 Cal. 2d Adv. p. 464, 139 P. 2d 645, 147 ALR 861, cited by Appellant. The California Vehicle Code, section 402, St. 1937, p. 2354, provides that the owner of a motor vehicle shall be responsible for the negligence of a person "using or operating" the vehicle with the owner's express or implied permission. "Operating" is interpreted to mean the actual physical act of operating the vehicle, and "using" is defined as having a connotation such as "master of the ship" (*Arcara v. Moresse*, 258 N. Y. 211, 179 N. E. 389.) *Souza v. Corti* merely held that if the authorized driver entrusted the physical operation of the vehicle to another, remaining in a position to control the manner of the physical operation by the other, thus remaining the "master of the ship", so to speak, and the use to which the vehicle was put was that contemplated by the owner, the owner would be responsible for negligence of the third party in his operation of the vehicle. And in the vast majority of these cases the one to whom the vehicle is originally entrusted by the owner is present in the vehicle at the time of its operation by the third party.

The limited scope of the decision in the *Souza* case is demonstrated by the Court itself when it states:

"In the present case the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner. Any secret restrictions imposed by him on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident. . . . Cases such as *Engstrom v. Auburn Auto Sales Corp.* 11 Cal. 2d 64, 77 P 2d 1059, . . . were concerned with violations of restrictions placed on the borrower as to the purpose for and the time within which the car was to be used. Further consideration need not now be given to those cases for the reason that we have here no question concerning the use of the car for the purpose or the period for which it was borrowed."

Arcara v. Moresse, supra, also cited by Petitioner, is perhaps more explicit in its explanation of the distinction between "use" and "operation". The court stated that it was true that if a collision had occurred in the territory where the use had been expressly forbidden by the owner, the use of the car would have been without permission, and that it would not have been a permitted use if the relative, against the express instructions of the owner, had employed the car to provide a pleasure trip for the one who was driving when the accident occurred; that an owner in loaning his car may reasonably restrict the uses to which it may be put and that consequently its employment for a prescribed purpose cannot be a permitted use; but that on the other hand, if the limited instructions relate to the manner of operation, such as the speedy or careless pilotage of the car, though the instructions be disobeyed, nevertheless the use is with the "permission" of the owner.

In connection with this line of cases cited by Petitioner, Respondent wishes to call to the Court's attention the fact that the Financial Responsibility Act for the District of Columbia does not employ the word "use" in any form, but was drafted by Congress, after New

York and other jurisdictions had enacted and interpreted statutes employing "use" and "operate", so as to read:

"Whenever any motor vehicle . . . shall be *operated* . . . by any person other than the owner, with the consent of the owner, express or implied, the *operator* thereof shall . . . be deemed to be the agent of the owner . . . and the proof of the ownership of said motor vehicle shall be prima facie evidence that such person *operated* said motor vehicle with the consent of the owner." (Emphasis added).

It is respectfully submitted that the very fact that Congress used only "operate", and not "use", in enacting the statute for this jurisdiction is clearly demonstrative of the legislative intent.

Appellant also cites *Mandell Chevrolet v. Thomas*, Original No. 2971, U. S. Court of Appeals for the District of Columbia, wherein this Court denied a petition for a Writ of Error to the Municipal Court. An examination of the record in this Court reveals one important fact which was omitted by Appellant from his statement of facts of the *Mandell* case, viz: Littlejohn, the driver, who was defendant's witness, testified that Griffin the owner's permittee, was in the car with him, and that he (Littlejohn) could have avoided the accident but Griffin grabbed the steering wheel and prevented him from so doing. Certainly, such testimony must have had a great bearing on the verdict and alone justified the trial court's refusal to direct a verdict for the defendant.

For the foregoing reasons, Appellee submits that the cases relied upon by Appellant in Argument I, are not good authority in support thereof because the facts and issues involved therein, as well as the statutes under which the actions were brought, are so different from the facts, issues, and the statute involved in the instant case, that they are not at all applicable to the instant question.

Appellant, in Argument II, asks whether "agency, as such, is any longer to be the criterion for liability upon the owner?" At considerable length, he argues that it is not. Respectfully, appellee submits, that no one can well argue, in the face of Title 40-403, D. C. Code, 1940 Edition and the many decisions thereunder that "agency" as understood at common law, is now the criterion. The test to be applied is that of "consent" by the owner to operation by another, and if such consent does exist, the operator is the owner's agent.

The Financial Responsibility Act provides that a person operating a motor vehicle with the express or implied consent of the owner shall "be deemed to be the agent of the owner". Certainly, this language is plain enough to leave no doubt as to the meaning of the Act. *Forrester v. Jerman*, 67 App. D. C. 167, 90 F. 2d 412, cited by appellant defeats his own argument, for the Court there held that the rule of liability under the Act is one in which "agency is based on consent." And further: the Act "makes the person to whom the owner has lent the automobile the agent of the owner."

"Consent" is now the criterion for liability rather than "agency", and when the defendant fails to overcome the presumption raised by the statute that his vehicle was being operated with his consent, a verdict against him will properly lie. However, if defendant does establish that the vehicle, at the time of the accident, was not being operated with his express or implied consent there can be no recovery against him. And that precise issue was before the Municipal Court of Appeals, and is now before this court.

Appellant cites, in Argument II, *Mason v. Automobile Finance*, 73 App., D. C. 284, 121 F. 2d. 32; *Ross v. Hartman*, 78 U. S. App., D. C. 217, 139 F. 2d. 14; *Schaff v. Claxton*, 79 U. S. App., D. C. 207, 144 F. 2d. 532; and *Claxton v. Schaff*, 83 U. S. App., D. C. 271, 169 F. 2d. 303.

The issue in the first of these cases was whether a chattel mortgagee is an "owner" within the provisions of the Financial Responsibility Act. Certainly the determination of that issue has no bearing upon the instant case.

The last three cases are too well known to necessitate a recitation of the facts and issues there involved. Suffice it to say that violation of a municipal ordinance intended to promote safety by requiring automobile ignitions to be locked while the vehicle is unattended in a public highway, etc., and the question of whether it is negligent to leave an unlocked vehicle unattended in a private lot, with the almost inevitable result of an intermeddler succumbing to temptation, are entirely different issues from the one in the instant cause. Fundamentally, Petitioner's argument is the same as that used when he relies upon those cases mentioned in "A" above, and Respondent submits that his remarks in "A" are equally applicable here.

The plaintiff introduced no evidence at the trial touching on the question of defendant's consent to the operation of his truck at the time of the accident, but relied entirely upon the presumption raised in his favor by the statute. To rebut and overcome this presumption defendant introduced evidence which the Municipal Court of Appeals held was of such nature that the trial court was in error in refusing to direct a verdict for defendant. The court, following the rule laid down in *Rosenberg v. Murray*, 73 App. D. C. 67, 116 F. 2d. 552, and recognized by *Hiscox v. Jackson*, 75 U. S. App. D. C. 293, 127 F. 2d 160, held that defendant's uncontradicted, positive and unequivocal evidence that the truck was being operated "without his knowledge, authority, or consent, . . . overcame the statutory presumption, just as similar testimony overcomes, as we have often held, the common-law presumption that an agent is on his master's business when he drives his master's car . . .", *Rosenberg v. Murray*, supra.

Appellant has not once in his brief argued, or attempted to argue, that the controlling decision of this Court, *Rosen-*

berg v. Murray, was not followed by the Municipal Court of Appeals, nor has he quarrelled with that decision. Instead, he has presented several points to the Court which he submits should be made the law in this jurisdiction to supplant that now existing. Stripped of surplusage, Appellant's argument is that defendant's evidence was not so strong as to compel a verdict for the defendant in the face of the presumption raised by the Financial Responsibility Act, and the Municipal Court of Appeals holding otherwise, it should be reversed.

Appellee respectfully submits that *Rosenberg v. Murray*, supra, is completely determinative of this cause so far as a discussion of the interpretation to be given Title 40-403, D. C. Code, 1940 Ed., is concerned, but to further aid this Honorable Court in its determination whether appellee's evidence constituted uncontradicted proof by an owner of a motor vehicle that same was not being operated with his consent and, therefore, overcame the contrary presumption arising from ownership, under Title 40-403, the following cases, all being pertinent and relevant to the issue, are cited and relied upon by appellee:

Rice v. Simmons, 53 A 2d, 587;
Senator Cab v. Rothberg, 42 A 2d 245;
Truman v. United Products, 217 Minn. 155, 14 N.W. 2d 120;
Abbey v. Northern States P. Co., 199 Minn. 41, 271 N. W. 416;
Owen v. Grantz, 216 App. Div. 19, 214 N.Y.S. 543;
Stapleton v. Hertz, 131 Misc. 52, 225 N. Y. S. 661;
Sheathelm v. Consumers P. Co., 280 Mich. 106, 273 N. W. 410;
Curry v. Bickley, 196 Iowa 827, 195 N.W. 617;
Heavilin v. Wendell, 214 Iowa 844, 241 N.W. 654, 83 A.L.R. 872;
Robinson v. Shell, 217 Iowa 1252, 251 N.W. 613;
Fallers v. Latimer, 217 Iowa 261, 251 N.W. 612;
Martel v. Dominion Motors, 43 Manitoba L.R. 54, 2 DLR 187

In his last point (Argument III) appellant contends that the Municipal Court of Appeals, under Title 11-772 (c) D. C. Code, 1940 Ed., the act establishing said court, has no authority to review issues of fact determined by a jury, and such is undeniably true. Appellee submits, however, that in the instant case, there were no issues of fact to be presented to the jury.

Appellant, to make out his case against appellee, relied entirely upon the presumption arising from the statute, that appellee's vehicle was being operated with his consent. Appellee, through his own testimony, and that of all parties who had knowledge of the situation, established that the vehicle was delivered to his employee with definite instructions and restrictions regarding the extent and manner of its use, and that in violation of these specific restrictions, the employee allowed a third party to take the vehicle.

Appellant introduced no evidence of any character to contradict such testimony, but in fact supported it by introducing the operator who testified that he did not know appellee, and had never received his consent to operate the vehicle.

Where then, is the "issue of fact, determined by the jury", for which, appellant contends, the Municipal Court of Appeals may not substitute its own opinion? We have only a presumption, relied upon by appellant with no supporting evidence thereof, opposed by uncontradicted evidence of the appellee. The presumption enabled appellant to make out a prima facie case, but when the presumption was met and overcome by appellee, appellant could no longer rely on it—it was incumbent upon him to introduce positive evidence to support his theory of the case.

"This presumption continues until there is credible evidence to the contrary, and ceases when there is uncontradicted proof that the automobile was not at the time being used with the owner's permission."

Rosenberg v. Murray, supra.

The Municipal Court of Appeals made no ruling on an "issue of fact", but ruled that there were no such issues; that, as a matter of law, the verdict was not supported by any evidence, and therefore should be set aside.

Its ruling was, that not only had *Rosenberg v. Murray*, supra, not been followed, but that the rule of two very important cases decided by this court had been disregarded:

Walker v. Warner, 31 App., D. C. 76, 87;

"... The appellant's contention would require that every case of uncontradicted and unimpeached evidence should be submitted to a jury, where there is no countervailing testimony. But this is not the law. The law is that positive testimony uncontradicted, and not inherently improbable, is prima facie evidence of the fact which it seeks to establish, and the jury is not at liberty to disregard it."

and *Stone v. Stone*, 78 U. S. App., D.C. 5, 136 F 2d 761:

"In this case there was positive testimony, uncontradicted, and not inherently improbable. Neither a jury nor a judge is at liberty to disregard such evidence. ' * * where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen. *Kelly v. Jackson*, 6 Pet. 622, 8 L. Ed. 523.' "

CONCLUSION

The decisions interpreting Title 40-403, D. C. Code, 1940 Ed; are eminently clear and uncontradictory; the statute itself speaks in the plainest language; the law of evidence, as laid down by this Honorable Court, as applicable to the instant case, cannot be misinterpreted. The Municipal Court of Appeals, in ordering the jury's verdict vacated and judgment entered for appellee, followed, in every particular, the precedents established by this Court, and the laws enacted by Congress. Its decision was merely that, viewed in the light of those precedents, appellant had failed to prove his case, not by a preponderance of the evidence, but by any evidence.

It did not render any new interpretation of the Financial Responsibility Act nor modify a decision of this Court, and therefore this Honorable Court need not consider appellant's arguments that the Municipal Court of Appeals failed to follow the law as appellant would like it to be. For this, fundamentally is appellant's appeal. He petitions the Court to reverse its own previous decisions, and legislate new law for the District of Columbia, so that the "general motoring public . . . may know in advance whether they have a remedy or not," and so "the many liability carriers who do business in this District . . . may regulate and govern their liabilities in accord with definite standard of liability."

No one who studies the law on this question can possibly fail to understand it, it having been expressed by statute and decision as clearly and succinctly as humanly possible. The only questions that can arise are in applying the law to particular facts, which is all that was done by thhe Municipal Court of Appeals.

The only question to be determined by this Court is whether the Municipal Court of Appeals acted correctly

in ruling that there was no evidence adduced at trial to support a verdict for the appellant.

Appellee submits that it did.

Respectfully submitted,

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